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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1959

CERTIORARI GRANTED NOVEMBER 9, 1959

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL POWER COMMISSION—Filed January 6, 1958

Martin A. Row, Leo J. Hoffman, P. O. Box 2880, Dallas 21, Texas, Robert E. May, Omar L. Crook, May, Shannon and Morley, 1700 K Street, N. W., Washington 6, D. C., Attorneys for Petitioner.

[fol. 2] To the United States Court of Appeals for the Fifth Circuit and the Honorable Judges Thereof:

Comes now Sun Oil Company (hereinafter called "Petitioner") and respectfully petitions this Honorable Court to review and set aside two orders of the Federal Power Commission (hereinafter called "Commission"), one issued September 12, 1957[1] and the other bearing an issue date of November 8, 1957 by which Petitioner is aggrieved as hereinafter set forth.

Statement of Venue

This petition to review is filed under and pursuant to the provisions of Section 19(b) of the Natural Gas Act

[1] The order issued September 12, 1957 is in the form of a letter dated September 12, 1957 signed by the Acting Secretary of the Commission. The Commission's "Order Denying Motion for Reconsideration" issued November 8, 1957, refers to the action taken by such letter as "Commission's" action.

of June 21, 1938, c. 556 (52 Stat. 831), U.S.C. Title 15, §§717r, which provides in part as follows:

> "(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit Court of appeals of the United States for any circuit wherein the natural-gas company to which the [fol. 3] order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such Court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Petitioner Sun Oil Company is a corporation organized and existing under the laws of the State of New Jersey, and is authorized to do business in each and all of the states of the United States. The principal place of business of Petitioner's Southwest Division is in the Rio Grande National Building, Dallas Texas. Petitioner is thus located in the Fifth Circuit within the meaning of Section 19(b) of the Natural Gas Act.

The Federal Power Commission is the agency of the United States Government charged with the administration of the Natural Gas Act.

Statement of Proceedings

Petitioner's principal business is in the production, transportation, refining and selling of crude oil. Incidental to its principal business, Petitioner has for many years been engaged, and is now engaged, in the business of producing and gathering natural gas and in selling a part of the gas which it produces to purchasers which are natural gas companies within the meaning of the Natural Gas Act.

Petitioner, being an independent producer and gatherer of natural gas, is within the purview of the definition [fol. 4] contained in the general orders issued by the Commission purporting to prescribe regulations governing the filing of rate schedules and applications for certificates

of public convenience and necessity by independent producers and gatherers of natural gas. The first of the series of such orders by the Commission, Order No. 174, was issued on July 16, 1954. This order was superseded by Order No. 174-A, issued on August 6, 1954. Order No. 174-A was thereafter revised by Order No. 174-B, issued on December 17, 1954. Petitioner has endeavored to make the filings with the Commission required by these orders but has uniformly made such filings only under compulsion of the orders and has specifically reserved its right to contest the jurisdiction of the Commission.

The nature of the proceedings here under review will be briefly summarized.

By transmittal letter dated September 16, 1954, Petitioner transmitted to the Commission for filing, under compulsion of Order No. 174-A, its contract with Southern Natural Gas Company ("Southern Natural") and one amendment thereto, covering the sale of natural gas produced in the Gwinville Gas Field, Jefferson Davis and Simpson Counties, Mississippi. This filing consisted of a contract dated August 26, 1947 and an amendment thereto dated September 10, 1953, and was received by the Commission on November 30, 1954. These documents were designated by the Commission as Sun Oil Company's FPC Gas Rate Schedule No. 55 and Supplement No. 1 thereto. Petitioner was further advised that this rate schedule had been accepted for filing.

[fol. 5] Certain provisions of Petitioner's FPC Gas Rate Schedule No. 55, the effect of which the Commission has ignored, are important to a chronological summary of this proceeding. Article XIV of such rate schedule provided:

"Term

"Subject to the various termination options given the parties hereto by the terms hereof, this agreement shall remain in force and effect for a period of ten (10) years, commencing on the date on which the first delivery of gas is made by Seller to Buyer hereunder."

"Price

Article XI, in part, provided:

"Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price

"(1) of seven and one-half cents (7½c) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof

"(2) of eight cents (8c) for each one thousand (1,000) cubic feet of gas during the second five (5) years of said term.

"In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas [fol. 6] reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *."

At the time Petitioner submitted its FPC Gas Rate Schedule No. 55 for filing, Petitioner also submitted for filing an Application for a Disclaimer of Jurisdiction or, in the Alternative, an Application for Certificate of Public Convenience and Necessity applicable to the gas then being delivered pursuant to its contract dated August 26, 1947, with Southern Natural Gas Company. Such application, in the alternative, specifically recited: "This application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described." Such application was docketed by the Commission and assigned Docket No. G-6658. Pursuant to due notice, a public hearing was held on such application in conjunction with other applications on May 21, 1956. By an order dated May 28, 1956, the Commission issued Petitioner a certificate of public convenience and necessity. In issuing such certificate, the Commission ordered that:

"(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of

this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully [fol. 7] described in the application and exhibits in this proceeding." It is thus apparent that Petitioner, in the alternative, applied for, and was granted, a certificate applicable to a sale which terminated under the specific terms of the contract quoted above ten years from the date on which the first delivery of gas was made, to-wit, September 3, 1947.

As such contract of August 26, 1947 terminated on September 3, 1957, Petitioner entered into an entirely new contract with Southern Natural applicable to sales of gas from the Gwinville Field, Jefferson Davis County, Mississippi as of August 1, 1957, for a term of twenty years from and after September 3, 1957.

By transmittal letter dated August 12, 1957, received August 13, 1957, Petitioner submitted, pursuant to the requirements of Section 154.92(b) of the Commission's regulations, as amended by Order No. 174-B, three copies of the contract between Petitioner and Southern Natural dated August 1, 1957 as a new rate schedule. On the same date, August 13, 1957, Petitioner filed with the Commission an Application for a Disclaimer of Jurisdiction or, in the Alternative, an Application for Certificate of Public Convenience and Necessity, applicable to the sale covered by such contract dated August 1, 1957. The Commission's acknowledgment card set forth that such application had been docketed and Docket No. G-13059 had been assigned thereto.

By a letter order issued September 12, 1957, which is the first order sought to be reviewed by this petition, the Commission rejected Petitioner's Application for Disclaimer of Jurisdiction or, in the Alternative, an Application for [fol. 8] a Certificate of Public Convenience and Necessity. By such letter order the Commission also rejected Petitioner's rate filing consisting of its contract dated as of August 1, 1957, without prejudice to refiling such contract as a "change" to its FPC Gas Rate Schedule No. 55. A

true and correct copy of such letter order of September 12, 1957 is attached to this Petition as Exhibit "A" and made a part hereof.

With respect to the rejection of Petitioner's alternative certificate application, the letter order issued September 12, 1957, specifically recited:

> "Such previously issued certificate [in Docket No. G-6658] is still applicable to the gas sales from the acreage even though the term of the gas sales contract dated August 26, 1947 * * * has expired. In view of such duplication, your application for a certificate of public convenience and necessity in Docket No. G-13059 is hereby rejected."

With respect to the rejection of Petitioner's rate schedule filing consisting of the contract dated August 1, 1957, the Commission set forth in such letter order of September 12, 1957:

> "In regards to your tender of a NEW CONTRACT dated August 1, 1957 as the rate schedule covering the sale from certain units in the Gwinville Field to Southern Natural, such proposed rate schedule duplicates sales from units covered by your existing FPC Gas Rate Schedule No. 55 and such proposed rate schedule embodies a change in the effective rate for gas sales from such units." (Emphasis added.)

[fol. 9] As it is apparent from the foregoing recitation of the filings made by Petitioner pursuant to the contract dated August 26, 1947, such contract as a rate filing or the certificate issued to Petitioner in Docket No. G-6658 did not in any way relate to or cover the sales contemplated by the contract dated August 1, 1957. Moreover, the later contract was not in existence at the time the Commission issued a certificate in Docket No. G-6658 on May 28, 1956 and could not therefore be involved with the sale contemplated in that docket or the rate schedule filing designated Petitioner's FPC Gas Rate Schedule No. 55.

On October 10, 1957 Petitioner filed a timely application for rehearing of the order issued September 12, 1957.

This application for rehearing was filed pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules and Regulations.

On the same date, October 10, 1957, Petitioner filed "under protest and under the compulsion of the letter order of September 12, 1957," and "without admitting the validity of said order and without prejudice to the rights of Sun Oil Company to contest the validity of said order," the contract dated August 1, 1957, together with other documents, in accordance with Section 154.94 of the Commission's Rules and Regulations, as a change in Petitioner's FPC Gas Rate Schedule No. 55, in order that Petitioner would not be further penalized by the erroneous order of the Commission dated September 12, 1957.

By an order issued November 8, 1957 in Docket No. G-13059, the Commission "accepted and considered" the [fol. 10] application for rehearing filed October 10, 1957 as a "motion for reconsideration" and denied the "petition for reconsideration." In a footnote "1" to such order the Commission recited that an application for rehearing may not be filed under Section 1.30(e) of the Commission's rules.[2] Such section provides:

> "No application for rehearing, provided for by the statute under which a proceeding is initiated and conducted, will be entertained by the Commission until a decision is issued and becomes final under the provisions of this section."

No action on an application or a rate schedule filing can be more final than its rejection which is the action taken by the Commission's order of September 12, 1957. Such order stated that the rejection was based upon the fact that:

---

[2] The Commission's order refers to a "petition for reconsideration," although the filing was captioned "Application for Rehearing." It also recited such "petition" was directed to the Commission's action by letter of September 13, 1957 rejecting Sun's application for a certificate and rate schedule filing of May 3, 1957. The letter Petitioner received is stamped "Sep. 12, 1957." The May 3, 1957 filing date is obviously erroneous.

"* * * a previously issued certificate, in Docket No. G-6658, is still applicable to gas sales from the same gas producing acreage in Gwinville Field to the same buyer, Southern Natural, and that an existing effective rate schedule, Sun's FPC Gas Rate Schedule No. 55, and supplements thereto, cover the continued serv-
[fol. 11] ice from that acreage even though the contract permitted to be filed as such rate schedule contains a termination date of September 2, 1957."

By an order also bearing the issue date of November 8, 1957 in Docket No. G-13664, which is the second order sought to be reviewed by this petition, the Commission designated the new contract of August 1, 1957, and a statement submitted therewith as required by Section 154.94, which were filed under protest as set forth above, as Supplements Nos. 3 and 4 to Petitioner's FPC Gas Rate Schedule No. 55, and suspended the effectiveness thereof until April 10, 1958, and ordered a hearing, pursuant to the authority of the Natural Gas Act, particularly Section 4 and 15 thereof, with respect to the "increased rates and charges."[3] A copy of such order of November 8, 1957, is attached hereto as Exhibit "B" and made a part hereof.

On December 2, 1957, Petitioner filed an Application for Rehearing, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules, with respect to the order issued November 8, 1957, in Docket No. G-13664. By letter order dated December 10, 1957 the Secretary of the Commission "rejected" such application for rehearing filed December 2, 1957. Such letter invited Petitioner's attention to Section 1.30(e) of the Commission's rules, quoted above, and stated "your application is not addressed to a final order within the meaning of the rules and is, therefore, not acceptable for filing."

[fol. 12] On December 6, 1957, the Commission issued an "Errata Notice" with respect to the "Order Denying Motion for Reconsideration" in Docket No. G-13059. Such "Errata

[3] Supplement No. 2 which became effective April 28, 1955 involved an increase in gas severance tax levied by the State of Mississippi.

Notice" changed the reference to Petitioner's contract with Southern Natural dated August 1, 1957 accepted for filing as a change in Petitioner's FPC Gas Rate Schedule No. 55, from " 'Supplements Nos. 3 and 4 to Sun's FPC Gas Rate Schedule No. 55' " to " 'Sun's FPC Gas Rate Schedule No. 87 and Supplement No. 1 thereto.' " Similarly, by an Errata Notice dated December 6, 1957 with respect to the Order for Hearing and Suspending Proposed Changes in Rates, in Docket No. G-13664, the Commission changed the reference to " 'Supplements Nos. 3 and 4 to Sun's FPC Gas Rate Schedule No. 55' " to " 'Sun's FPC Gas Rate Schedule No. 87 and Supplement No. 1 thereto.' "

As the Commission's order issued September 12, 1957 set forth that the contract dated August 26, 1947 "has expired" and the Errata Notice assigns a new rate schedule number to such contract, it is apparent that the Commission recognized that the contract dated August 1, 1957, did not in any way purport to alter, amend, extend or in any manner modify or relate to the contract dated August 26, 1947.

Points Relied Upon

In this petition to review Petitioner relies upon the points hereinafter set forth, all of which were urged in the application for rehearing.

I.

[fol. 13] The Commission's order issued September 12, 1957 is unlawful for the reason that the Commission is without authority to reject Petitioner's application for a certificate of public convenience and necessity filed August 13, 1957.

As set forth in the Statement of the Proceedings, Petitioner's application for a certificate of public convenience and necessity was only applicable to the sale covered by the contract dated August 26, 1947, and the certificate of public convenience and necessity issued May 28, 1956 in Docket No. G-6658 pursuant thereto was for the sale of natural gas "as more fully described in the application and exhibits" in that proceeding. As also set forth above, the

contract dated August 26, 1947 specifically provided that "* * * Seller [Petitioner] is simply selling and Buyer is purchasing the quantity of gas called for in this agreement * * *." The Commission has authority to grant certificates of limited duration as decided by the United States Court of Appeals for the Third Circuit in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 239 F. 2d 97. The Supreme Court affirmed this authority of the Commission in a *Per Curiam* opinion of April 29, 1957 (25 LW 3317), wherein it is stated:

> "Per Curiam: The power of the Court of Appeals in reviewing the order of the Federal Power Commission was exhausted when it held that the Commission had authority under Sec. 7(c) and (e) of the Natural Gas Act to issue certificates of public convenience and necessity of limited duration. * * *"

[fol. 14] Under these circumstances it is clear that the certificate issued May 28, 1956 did not cover the new sale to Southern Natural, the terms of which are set forth in the contract dated August 1, 1957.

The application filed August 13, 1957 conformed to all the formal requirements of the Natural Gas Act and the Commission's Regulations. Under Section 7(c) of the Act Petitioner's contract of August 1, 1957 is a contract by which Petitioner proposes to ENGAGE in a sale of gas for which a certificate is both permitted and required. Such sale is separate and distinct from any other sale, and is not a continuation of another sale. Moreover, with respect to such sale Petitioner meets all of the qualifications imposed by Section 7(e) of the Act. Under Section 157.23(b) of the Commission's Regulations implementing the foregoing provisions of the Natural Gas Act the sale of gas covered by Petitioner's contract of August 1, 1957, is a "new" sale for which a certificate again is both permitted and required. Therefore, the Commission's purported rejection of Petitioner's application for a certificate is contrary to both the Natural Gas Act and the Commission's own Regulations.

The Commission's order purporting to reject Petitioner's application for certificate is unlawful for the reason that such purported action was taken without according to Petitioner a hearing on its application for certificate pursuant to the mandatory requirements of Section 7(c) of the Natural Gas Act. Such section requires that in all certificate cases "the Commission SHALL set the matter for [fol. 15] hearing."[1] The mandatory character of this requirement of a hearing on all certificate applications was recognized and enforced in *Northeastern Gas Transmission Company* v. *Federal Power Commission*, 195 F. 2d 872, 880 (3rd Cir. 1952), cert. denied, 344 U.S. 818, where the Court held that the natural-gas company was entitled to a hearing on its certificate application "as a matter of right."

Even if it were assumed *arguendo* that the certificate issued May 28, 1956 was not of limited duration, Petitioner's rate filing received by the Commission on November 30, 1954 expired on September 3, 1957 and the new contract with Southern Natural dated August 1, 1957 became Petitioner's initial rate schedule as discussed hereinafter under Points II to VII, both inclusive.

II.

The letter order of September 12, 1957, rejecting Petitioner's rate schedule filing is unlawful as Petitioner is permitted and required to file the contract dated August 1, 1957, as its initial rate schedule.

Petitioner's contract of August 26, 1947, with Southern Natural, which is on file with the Commission as Petitioner's FPC Gas Rate Schedule No. 55, expired and terminated by its own terms at the expiration of the stipulated term of the contract on September 3, 1957. As set forth above, the Commission recognized that such contract had expired. Petitioner's contract of August 1, 1957, with Southern Natural, which the Commission has purported to reject as a rate schedule, covers an entirely [fol. 16] distinct and separate sale of gas to Southern

[1] All emphasis is supplied in this petition unless otherwise indicated.

Natural. Petitioner is, therefore, entitled to file such contract of August 1, 1957, as an initial rate schedule under the provisions of Section 4(c) of the Natural Gas Act and Section 154.92(b) of the Commission's Regulations. Since Petitioner's rate schedule filing clearly falls within the scope of those provisions as an initial rate schedule, the Commission is without authority, either under the statute or under its own regulations, to reject such initial filing.

Section 4(c) of the Act provides that, " * * * every natural gas company shall file with the Commission, * * * and shall keep open in convenient form and place for public inspection, SCHEDULES SHOWING ALL RATES AND CHARGES FOR ANY transportation or SALE subject to the jurisdiction of the Commission, * * *." Under Section 154.92(b) of the Commission's Regulations, "Every independent producer who, * * * proposes to INITIATE an interstate transportation or SALE of natural gas subject to the jurisdiction of the Commission to an EXISTING or new CUSTOMER shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be INITIATED a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale * * *."

Within the meaning of these provisions Petitioner's contract of August 1, 1957, accomplishes a SALE of natural gas and such sale is entirely separate and distinct from any other sale. Even the Commission's Regulations recognize that such a separate and distinct sale may be made to [fol. 17] an EXISTING customer without losing its identity as a separate and distinct sale. Hence, Petitioner is entitled, and even required, by the statute and the regulations to file an initial rate schedule covering such sale. Petitioner's contract of August 1, 1957, constitutes its rate schedule for the sale under the provisions of both Section 4(c) of the Natural Gas Act and Section 154.93 of the Commission's Regulations. Hence, Petitioner's filing of its contract of August 1, 1957, as its initial rate schedule for the sale covered thereby met all formal requirements of

the statute and the regulations and the Commission was without authority to reject the filing.

III.

The order issued September 12, 1957 in Docket No. G-13059 and the order bearing an issue date of November 8, 1957 in Docket No. G-13664 which purports to reject the contract dated August 1, 1957 as an initial rate schedule, to find such contract constituted a change in Petitioner's FPC Gas Rate Schedule No. 55, to compel Petitioner to file such contract of August 1, 1957 as a so-called "change" in such rate schedule to avoid further penalties and to suspend the effectiveness thereof are erroneous and unlawful for the following reasons:

The contract of August 26, 1947, filed and designated as Petitioner's FPC Gas Rate Schedule No. 55, expired and terminated by its own terms. It no longer exists as the basis for any change. The contract of August 1, 1957, purportedly rejected by the Commission, is in no sense a "change" in the earlier contract or in the prices or terms set out therein or in the sale of that date to Southern [fol. 18] Natural. Rather, the contract of August 1, 1957 is a separate and distinct contract covering an entirely separate and distinct sale. There is no relationship between the two contracts which can properly be made the basis for any theory that the later contract is a "change" in the earlier contract or that the later contract "supersedes" the earlier contract, nor does the sale accomplished by the later contract "duplicate" the sale accomplished by the earlier contract under any valid theory.

Petitioner's contract of August 1, 1957 can not validly be treated as a "change" in rate or rate schedule within the meaning of Sections 4(d) and (e) of the Natural Gas Act. Therefore, the Commission's order of September 12, 1957 unlawfully required that such contract be submitted, if at all, "in accordance with Section 154.94 of the Commission's Regulations, Changes in Rate Schedules."

Even under the Commission's Regulations, Petitioner's contract of August 1, 1957 is not a "change" in the earlier contract with Southern Natural which had been filed and

designated as Petitioner's FPC Gas Rate Schedule No. 55, nor is it a "change" in such rate schedule. Under Section 154.93 of the Regulations, Petitioner's Rate Schedule No. 55 consisted exclusively of the "basic contract" of August 26, 1947 "and all supplements or agreements amendatory thereof." Such basic contract has not been supplemented or amended since the initial filing thereof with the Commission by Petitioner as a rate schedule, and such basic contract came to a complete end by its own terms as of September 3, 1957. Petitioner does not seek to make any [fol. 19] supplement or amendment to such contract or to the rate schedule which consists of such contract, or to change the rate contained therein, but only to make effective an entirely separate and distinct sale of gas under an entirely separate and distinct contract. Section 154.94 of the Commission's Regulations is not applicable to such a state of facts where there is no proposal to change an existing rate or rate schedule covering an existing sale. If such section of the Regulations be construed by the Commission as applicable to such facts, then such section of the Regulations is in conflict with Section 4 of the Natural Gas Act and is necessarily void.

It is clear from the Natural Gas Act that the Commission's power to apply the provisions of Sections 4(d) and (e) thereof is limited exclusively to a "change" in rates and does not extend to the "initial filing" thereof, as is the case here. The only provisions in the Act for action by the Commission with respect to rates and charges filed initially by a natural-gas company are to be found in Section 5 of the Act, which action can only be taken after hearing and on the basis of proper findings.

The order of suspension in Docket No. G-13664 is invalid for the further reason that, even assuming, *arguendo*, the Commission had authority to suspend, the order fails to contain a "statement in writing of its [the Commission's] reasons for such suspension" as required by Section 4(e) of the Natural Gas Act.

[fol. 20] Further assuming, *arguendo*, the Commission's authority to suspend, the suspension order in Docket No. G-13664 is invalid because it was not issued until more than 30 days had elapsed after the date of filing, and

was thus in contravention of Section 4(d) of the Natural Gas Act. Although the Commission addressed a telegram to Petitioner on November 8, 1957, advising of its action, the order itself was not released until November 13, 1957, which was beyond the statutory period of 30 days. The telegraphic advice to Petitioner constitutes insufficient compliance with the statute.

IV.

The Commission's letter order of September 12, 1957 and the order bearing an issue date of November 8, 1957, are invalid also because they are in conflict with the decisions of the Supreme Court of the United States in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Petitioner's contract of August 1, 1957, does not constitute a modification or amendment newly changing a previously filed rate schedule. As was made plain by the Supreme Court in the *Mobile* case, the basic scheme of the Natural Gas Act is to permit rates to be determined in the first instance by natural-gas companies, by contract or otherwise the initial rate-setting powers are with the natural-gas companies. Under the Court's analysis of the Act, Petitioner's contract of August 1, 1957, constitutes an exercise by Petitioner of its INITIAL RATE-SET-[fol. 21] TING POWER and the Commission is without authority to treat the contract as a "change" within the meaning of Section 4 of the Act.

In this proceeding the contract comprising the previously filed rate schedule has terminated and expired by its own terms. The ONLY rate established by agreement of the parties from and after September 3, 1957, is the price set out in the contract of August 1, 1957. Hence by issuing the order purporting to reject the rate schedule filing the Commission has done what the Supreme Court said it has no power to do in the *Mobile* case. It has usurped the right reserved to natural-gas companies by the Act to establish their rates initially. This is so because the price which the Commission purports to continue in effect, in

the absence of a "change" filed and permitted to become effective under Section 4 of the Act, can not be rested upon any contract between the companies involved. The contract which gave rise to such price initially has terminated and expired by its own terms. A separate and distinct sale and purchase of gas has been made by the parties under the contract of August 1, 1957, and the Commission may not lawfully refuse to permit Petitioner to file such contract as its initial rate schedule.

V.

The Commission's order of September 12, 1957 and the order bearing an issue date of November 8, 1957 purporting to reject the contract between Petitioner and Southern Natural is in contravention of Section 5 of the Natural Gas Act.

[fol. 22] By such orders of September 12, 1957 and November 8, 1957, the Commission purports to extend the term of the contract dated August 26, 1947, and to modify the price provisions of the contract dated August 1, 1957.

Under Section 5 of the Natural Gas Act, the Commission is required to accord Petitioner notice and hearing and is required to make the requisite finding before making any modification of an initial rate schedule. *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 226 F. 2d 60, 66, cert. denied 350 U.S. 987; *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 341.

VI.

The Commission's order of September 12, 1957 unlawfully rejects Petitioner's rate schedule filing.

Under Sections 4 and 5 of the Natural Gas Act, prescribing the procedure to be followed by the Commission with respect to rate schedule filings, the Commission is not authorized to reject a rate schedule filing meeting all formal requirements. That the Commission lacks statutory power to reject a gas rate schedule filing was authoritatively determined by the United States Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *Federal*

Power Commission, 202 F. 2d 899, 902 (1953), where an order of the Commission purporting to "reject" a tariff schedule filing was set aside.

[fol. 23] VII.

The Commission's order of September 12, 1957 and the order bearing the issue date of November 8, 1957 unlawfully deprive Petitioner of its contractual and property rights without due process of law.

The Commission's orders are unlawful for the reason that the Commission failed to give notice to Petitioner and failed to accord Petitioner an opportunity for hearing, contrary to the Natural Gas Act, the Administrative Procedure Act, and the due process clause of the Fifth Amendment to the Constitution of the United States.

The Commission's orders are unlawful for the reason that the orders lack adequate and proper findings of fact and conclusions of law in support of the Commission's ultimate conclusions therein, contrary to the Natural Gas Act (particularly Sections 4, 5 and 7 thereof), the Administrative Procedure Act (particularly Section 8(b) thereof), and the Fifth Amendment to the Constitution of the United States. The Commission's ultimate conclusions set out in the orders are plainly not related by the Commission, by adequate findings, to the requirements of the Natural Gas Act with respect to rate schedule filings and certificate applications, as such requirements are discussed above in this petition to review. Moreover, the orders of the Commission are not supported by substantial evidence and are, therefore, unlawful. This deficiency is particularly glaring with regard to the Commission's findings in the order of September 12, 1957 that "such proposed rate schedule duplicates sales from units covered by your existing FPC Gas Rate Schedule No. 55" [fol. 24] and that "such proposed rate schedule embodies a change in the effective rate for gas sales from such units."

For all the foregoing reasons Petitioner is aggrieved by the order of the Commission issued September 12, 1957 and the order bearing an issue date of November 8, 1957.

Prayer

Wherefore, Petitioner prays:

1. That a copy of this petition be served upon a member of Respondent, Federal Power Commission, in accordance with Section 19(b) of the Natural Gas Act.

2. That the Respondent, Federal Power Commission, be required, in conformity with said Section 19(b) of the Natural Gas Act, to certify and file with this Court the record upon which the orders here sought to be reviewed were entered.

3. That this Court review, and upon review, set aside the order issued September 12, 1957 and the order bearing the issue date November 8, 1957.

[fol. 25] 4. That this Court grant to Petitioner such other and further relief in the premises as the rights and equities of the cause may require.

Respectfully submitted,

Martin A. Row, Leo J. Hoffman, P. O. Box 2880, Dallas 21, Texas, Robert E. May, Omar L. Crook, May, Shannon and Morley, 1700 K Street, N. W., Washington 6, D. C., Attorneys for Petitioner, By Robert E. May.

Verification

Duly sworn to by Robert E. May, jurat omitted in printing.

[fol. 26] Notes Re Exhibits "A" and "B"

Exhibit "A"—Letter, Michael J. Farrell, Acting Secretary to Sun Oil Company, dated 9/12/57;

Exhibit "B"—Order for Hearing and Suspending Proposed Changes in Rates, Issued 11/18/57;

Commissioner Digby, Dissenting;

Omitted—hereafter copied at folios 174 & 192, printed pages 123 & 136.

. . . . . .

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER TO FILE PETITION FOR REVIEW, ETC.—
Filed January 6, 1958

A petition for review of orders of the Federal Power Commission issued on Sept. 12, 1957 and Nov. 8, 1957 in Docket Nos. G-13059 and G-13664 having been presented to this Court:

It is Ordered that said petition be filed and docketed as of January 6, 1958;

And it is further ordered that a copy of this Order and said Petition be forthwith served upon the Federal Power [fol. 27] Commission, and that said Federal Power Commission, upon service of such copies, forthwith certify and file in this Court a transcript of the record in the proceeding in conformity to Rule 38, as amended, of this Court.

Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit.

New Orleans, Louisiana, January 6, 1958.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 17040, 17049, 17128 and 17136

SUN OIL COMPANY, S. W. RICHARDSON, HUMBLE OIL & REFINING COMPANY, MAGNOLIA PETROLEUM COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent.

ORDER DENYING MOTION TO CONSOLIDATE—
Filed April 28, 1958

On Consideration of the motion filed by respondent to consolidate the above entitled and numbered causes for hearing, to fix dates for filing briefs before the records are printed, to provide the mode of citation to the records in the briefs, and to provide for printing of parts of the [fol. 28] records as a single joint appendix following the dates fixed for filing the briefs; and of the answers and objections of petitioners thereto,

It is Ordered that said motion be, and it is hereby, denied;

It is Further Ordered that the Federal Power Commission file in this Court in each of the above entitled causes, a certified transcript of the proceedings before said Commission within thirty (30) days from the date of this Order, so that said proceedings may be printed by each petitioner, in accordance with Rules 38 and 39 of this Court, as amended. All subsequent proceedings in this Court will be in accordance with the Rules of this Court.

John Minor Wisdom, U. S. Circuit Judge.

April 28, 1958, New Orleans, La.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,040

SUN OIL COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

CERTIFICATE OF TRANSCRIPT OF THE RECORD—
Filed February 15, 1958

Pursuant to the provisions of Section 19 (b) of the Natural Gas Act (15 U.S.C. § 717r (b)) and Paragraph 1 of Rule 38 of this Court, as amended May 20, 1955, [fol. 29] the Federal Power Commission hereby certifies that the documents and other material listed and described below constitute the complete record upon which the letter order dated September 12, 1957, in a proceeding before the Commission entitled *In the Matter of Sun Oil Company,* Docket No. G-3059, and the Commission's order issued November 8, 1957, in a proceeding before the Commission entitled *In the Matter of Sun Oil Company,* Docket No. G-13664, complained of in the petition in the above-entitled proceeding, were entered.

Description of Document	
Letter, dated September 16, 1954, from Sun Oil Company to Secretary transmitting the former's FPC Gas Rate Schedule No. 55 and Supple. No. 1 thereto, received November 30, 1954	24
Application of Sun Oil Company for a disclaimer of jurisdiction or, in the alternative, an application for certificate of public convenience and necessity, Docket No. G-6658, filed November 30, 1954.	
Page 1	26
Exhibit B	31

Sun Oil Company's FPC Gas Rate Schedule No. 55, together with Supplements thereto, filed November 30, 1954.
Page 1 32
Supple. No. 1, p. 1 52
Gas Statements, sh. 1 54
Gas & Distillate Statement 55
Supple. No. 2, filed 4/28/55, page 1 56
Statement 58
[fol. 30]
State. of Reasons,
page. 1 60
Page 2 60
Sun Oil Company's FPC Gas Rate Schedule No. 87 and Supple. No. 1 thereto, filed October 10, 1957.
Cover 61
"Index" 61
Page 1 62
Exhibit A 85
Supple. No. 1, p. 1 87
Statement 90
State. of Reasons 92
Letter, dated March 23, 1955, from Secretary to W. E. Warren advising that Sun Oil Company's FPC Gas Rate Schedule No. 55 and Supple. No. 1 thereto have been accepted for filing.
Page 1 93
Letter, dated June 6, 1955, from Secretary to Sun Oil Company advising the latter that Supple. No. 2 to its FPC Gas Rate Schedule No. 55 has been accepted for filing 95
Letter, dated June 28, 1955, from Sun Oil Company to Secretary modifying statement in support, Supple. No. 2 to Sun's FPC Gas Rate Schedule No. 55, received July 5, 1955 97
Findings and order issuing certificates of public convenience and necessity, Docket No. G-3275, *et al.*, Docket No. G-6658, issued May 28, 1956.
Page 1 99
Commissioner Digby, concurring 110

[fol. 31]
Letter, dated August 12, 1957, from Sun Oil Company to Secretary transmitting Sun's FPC Gas Rate Schedule No. 87, received August 13, 1957.
Page 1 113
Application of Sun Oil Company for a disclaimer of jurisdiction or, in the alternative, an application for certificate of public convenience and necessity, Docket No. G-13059, filed August 13, 1957.
Page 1 115
Exhibit A 121
Letter, dated August 16, 1957, from Sun Oil Company to Secretary correcting Sun's letter dated August 12, 1957 122
Letter, dated September 12, 1957, from Acting Secretary to Sun Oil Company rejecting and returning rate schedule and application for certificate of public convenience and necessity.
Page 1 123
Application of Sun Oil Company for rehearing, Docket No. G-13059, filed October 10, 1957.
Page 1 124
Order denying motion for reconsideration, Docket No. G-13059, issued 11/8/57.
Page 1 133
Commissioner Digby, dissenting 134
Errata Notice, dated December 6, 1957 135
Order for hearing and suspending proposed changes in rates, Docket No. G-13664, issued November 8, 1957.
Page 1 136
Commissioner Digby, dissenting 138
Errata Notice, dated December 6, 1957 138
[fol. 32]
Letter, dated November 13, 1957, from Secretary to Sun Oil Company transmitting orders issued in Docket Nos. G-13059 and G-13664 139
Application of Sun Oil Company for rehearing, Docket No. G-13664, filed December 2, 1957.
Page 1 140

Letter, dated December 10, 1957, from Secretary to Robert E. May rejecting and returning Sun Oil Company's application for rehearing, Docket No. 13664 145

By the Commission.

In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 14th day of February, 1958, at Washington, D.C.

J. H. Gutride, Secretary.

[fol. 33]

BEFORE THE FEDERAL POWER COMMISSION

Received Nov. 30, 1954.

Sun Oil Company

Southwest Division
Rio Grande National Building
Dallas 2, Texas

S. M. Gladney
Manager
T. F. Hill
Assistant Manager

A. S. Rhea
Supt. Operating Dept.

September 16, 1954.

Leon M. Fuquay, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

Pursuant to the requirements of Section 154.92 of the Commission's regulations, as amended by Order No. 174-A issued in Docket No. R-138 on August 6, 1954, there are transmitted herewith for filing as a rate schedule two

copies of the contract and all amendments and supplements thereto between Sun Oil Company (Southwest Division) and the purchaser of gas named below, which contract was in effect on June 7, 1954.

Purchaser: Southern Natural Gas Company.

Date of Contract and Amendments: Contract dated August 26, 1947, Agreement dated September 10, 1953. [fol. 34] Such contract and amendments contain the terms and conditions of service and all rates and charges for the sales made thereunder. Sun Oil Company has no knowledge with respect to the ultimate point of consumption of the gas sold under such contract.

There are also enclosed two copies of a recent bill, under the above-listed contract, showing how the billing amount is determined.

With regard to this filing, address communications to: James E. Pew, Mgr., Natural Gas Dept., 1608 Walnut St., Philadelphia 3, Pa.; and B. E. Warren, P. O. Box 2880, Dallas, Texas.

This filing is made under compulsion of the Commission's Order No. 174-A without admitting the validity of such order and without admitting that the Federal Power Commission has jurisdiction over either Sun Oil Company or the subject matter of this filing, and without prejudice to the rights of Sun Oil Company to contest the validity of said order, and without prejudice to its right to contest the jurisdiction of the Commission over the subject matter of this filing.

Yours very truly,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By (Illegible),
Superintendent, Natural Gas Department.

[fol. 35]

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR A DISCLAIMER OF JURISDICTION OR, IN THE ALTERNATIVE, AN APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY—

Received November 30, 1954

100-2 Formal

Docket No. G-6658

In the Matter of

SUN OIL COMPANY (Southwest Division).

Sun Oil Company (Southwest Division), hereinafter referred to as "Sun", hereby applies for an Order of the Commission disclaiming jurisdiction over the facilities and sales of natural gas hereinafter described, or, in the alternative, without waiving its position that its facilities and sales of natural gas are not subject to the Commission's jurisdiction, Sun hereby applies for a certificate of public convenience and necessity, pursuant to the Commission's Order No. 174-A, to authorize the continued sales by Sun of its gas.

I.

In support of this application, Sun, for a Disclaimer of Jurisdiction, respectfully shows:

[fol. 36] Sun is a corporation organized under the laws of the State of New Jersey. Its principal business is the production, transportation, refining, and selling of crude oil, and the marketing of refined products recovered from crude oil. Incidental to its principal business, it has for many years been engaged, and is now engaged in the business of producing and gathering natural gas, and selling a part of the gas which it produces to purchasers which are natural-gas companies within the meaning of

the Natural Gas Act. The gas which Sun sells to natural-gas companies is being sold and delivered from facilities which are not under the Commission's jurisdiction, and is being sold under the contracts executed during the period of time when the Commission was construing the Natural Gas Act as not being applicable to sales of gas by independent producers and gatherers to natural-gas companies transporting such gas in interstate commerce, and Sun does not own or operate facilities which are under the jurisdiction of the Commission. Consequently, Sun is engaged solely in the production and gathering of natural gas within the meaning of Section 1 (b) of the Natural Gas Act and is not a "natural-gas company" as defined in the Act.

This application is filed under compulsion of the Commission's Order No. 174-A issued in Docket No. R-138 on August 6, 1954. Sun does not admit the validity of such order but on the contrary contests the validity of such order and denies the Commission's jurisdiction over either Sun or its facilities or its sales or any of its operations. This application is filed without prejudice to Sun's right to contest the validity of the aforesaid order and [fol. 37] without prejudice to its right to contest the jurisdiction of the Commission over Sun and the subject of this Application.

It is therefore respectfully submitted that the Commission should issue an order disclaiming jurisdiction as herein requested.

II.

Without waiving its position that Sun's facilities, sales, and operations are not subject to the Commission's jurisdiction, Sun, in support of its request that a certificate of public convenience and necessity be issued to authorize the continuance of its sales, respectfully shows:

(1) The exact legal name of the applicant is Sun Oil Company. It is a corporation organized and existing under the laws of the State of New Jersey. The location of Sun's principal place of business is Philadelphia, Pa.

It is authorized to do business in each and all of the United States.

(2) Sun has no knowledge of any predecessor interest bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The names, titles and post office addresses of the persons to whom correspondence or communications in regard to this application should be addressed are: James E. Pew, Mgr., Natural Gas Dept., 1608 Walnut St., Philadelphia, Pa.; and B. E. Warren, P. O. Box 2880, Dallas, Texas.

[fol. 38] (4) As stated above, Sun denies that it is a natural gas company and denies that it was, on June 7, 1954, engaged in either the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale. Sun was, on June 7, 1954, and now is, delivering gas subject to the contract with the following Purchaser: Southern Natural Gas Company, which contract has either been heretofore filed, or is being filed contemporaneously herewith, as a rate schedule.

(i) The source of gas produced by applicant is:

(a) Approximate location of fields: Gwinville Field, N ½ of Jefferson Davis County, Mississippi.

(b) Point of delivery: Same as (a) above.

(ii) Sun is not engaged in the transportation of natural gas in interstate commerce and does not own any pipe line so transporting natural gas and subject to the jurisdiction of the Commission. The gas being delivered by Sun to said Purchaser is being transported by such Purchaser but Sun does not have knowledge of the detailed route or routes through which such Purchaser transports such gas.

(iii) Sun did not, on June 7, 1954, and does not now propose to, serve any communities either at wholesale or at retail.

(iv) Sun did not, on June 7, 1954, and does not now propose to, deliver any gas to any main line industrial customers.

[fol. 39] (v) At the location indicated on the map attached hereto as Exhibit "B", Sun owns the following major appurtenant properties and facilities: None.

III.

Copy of this application has been served upon The Governor of the State of Mississippi.

IV.

There is attached hereto the following exhibit:

(1) Exhibit "B". A general key map of applicant's facilities for the production, gathering, or sale of natural gas to the purchaser designated above at the location indicated on said map, and showing the information designated in Section 157.25 of the Commission's regulations as amended by Order No. 174-A.

Applicant's description or showing of any facilities in this application or in any exhibit attached hereto is intended only for the information of the Commission, and not for the purpose of requesting a certificate of public convenience and necessity for the construction or operation of such facilities. This application is hereby made only for a certificate of public convenience and necessity for the construction or operation of such facilities. This application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described. Applicant does not herein represent any person, individual, or corporation, other than Sun Oil Company.

[fol. 40] Wherefore, Sun respectfully requests that (a) the Commission without a hearing issue the disclaimer of jurisdiction herein requested, or (b) in the alternative, and without waiving Sun's position that the Commission lacks jurisdiction over Sun, its facilities and operations, that the

Commission issue the certificate of public convenience and necessity herein requested.

Sun further requests that, in the event the disclaimer of jurisdiction herein requested is not granted, this application be disposed of in accordance with the shortened procedure provided for in Section 1.32 of the Commission's Rules and Regulations. In accordance with said rule, Sun hereby requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission.

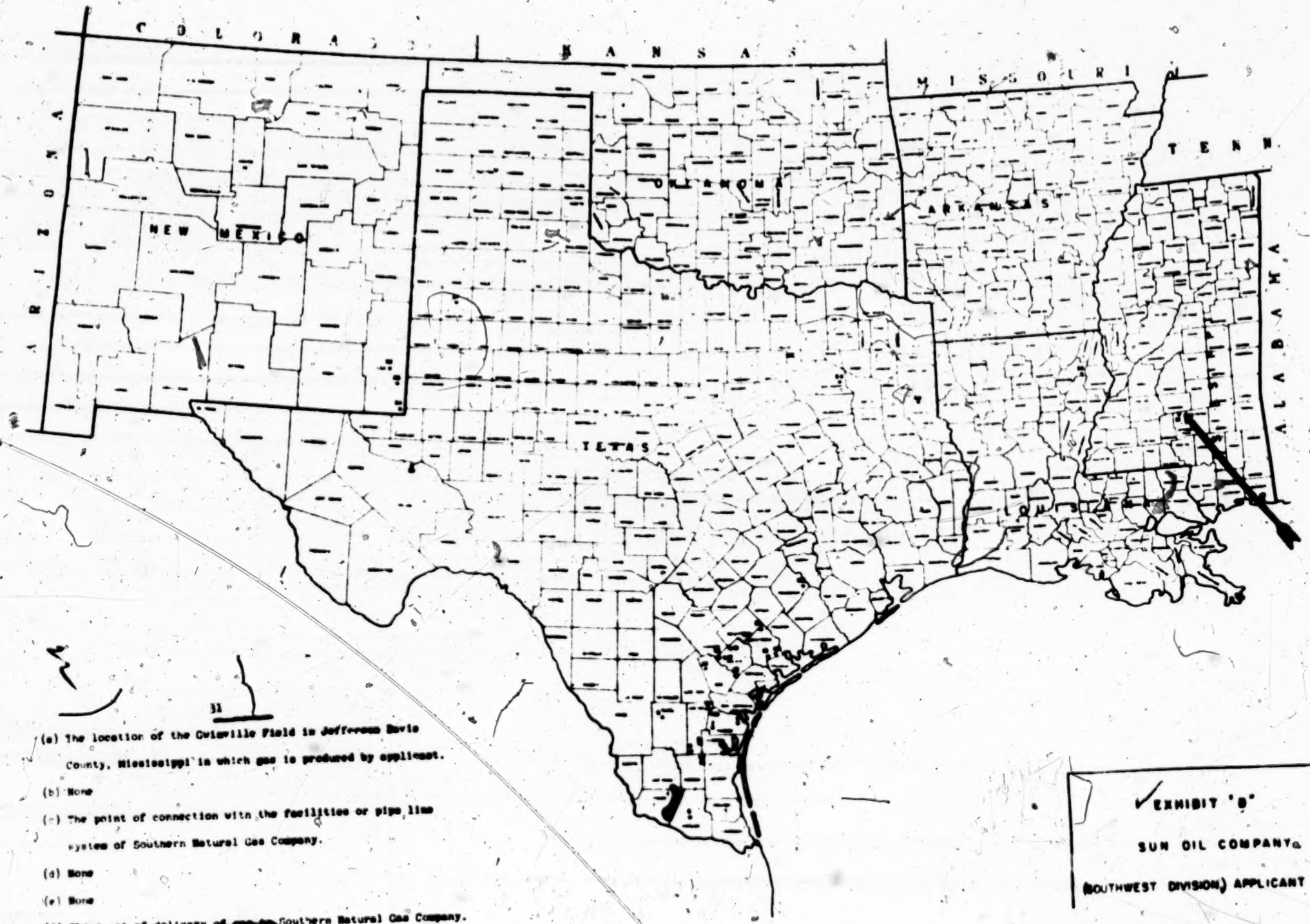
Respectfully submitted,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By (Illegible),
Superintendent of Natural Gas Dept.

P. O. Box 2880,
Dallas, Texas.

[fol. 41] *Duly sworn to by B. E. Warren, jurat omitted in printing.*



31

(a) The location of the Gwinville Field in Jefferson Davis County, Mississippi in which gas is produced by applicant.

(b) None

(c) The point of connection with the facilities or pipe line system of Southern Natural Gas Company.

(d) None

(e) None

(f) The point of delivery of [redacted] Southern Natural Gas Company.

EXHIBIT "B"

SUN OIL COMPANY

(SOUTHWEST DIVISION) APPLICANT

[fol. 43] BEFORE THE FEDERAL POWER COMMISSION

FPC GAS RATE SCHEDULE NO. 55

Filing Date Nov. 30, 1954.
Effective Date Accepted.

Original Papers

This Agreement, made and entered into by and between Sun Oil Company, a corporation of the State of New Jersey, hereinafter called "Seller", and Southern Natural Gas Company, a Delaware corporation, herein called "Buyer,"

Witnesseth That:

Whereas, Seller is the owner and holder of various oil, gas and mineral leases covering lands in Jefferson Davis and Simpson Counties, Mississippi, in what is known as the Gwinville Gas Field and has developed a supply of natural gas from such leases, and Seller desires to secure a market for such gas from its existing wells and from wells it may drill in the future or in which it may have an interest in said field; and

Whereas, Buyer is the operator of a natural gas pipe line system and has a market for natural gas produced from the Gwinville Gas Field, and Buyer desires to purchase gas produced by or for Seller from said field;

Now, Therefore, in consideration of the mutual covenants herein contained, Seller and Buyer agree as follows:

Article I

Gas Sold and Purchased

Subject to the terms and provisions hereof and during the term of this agreement, Seller agrees to use reasonable [fol. 44] diligence to make available to Buyer and to sell and deliver to Buyer, and Buyer agrees to purchase and receive from Seller and to pay Seller for, natural gas produced from Seller's lands and leases in the Gwinville Gas Field and from wells in said field in which Seller may have an interest, in the amounts and for the price hereinafter specified. Within the minimum and maximum

quantity of gas hereinafter specified, and subject to the terms of Article III hereof, this agreement shall apply to all merchantable natural gas that may be produced from all wells now drilled or which may hereafter be drilled on all lands and leaseholds now or hereafter owned by Seller located in the Gwinville Gas Field as now defined, or as it may be extended, and all of Seller's proportionate part of all merchantable natural gas that may be produced from unitized or pooled lands and leaseholds owned or controlled by Seller, and the proportionate part of such gas which belongs to other owners and leaseholders in such unitized or pooled lands and leaseholds which Seller has or shall hereafter from time to time have the right to market under the terms of the pooling, unitization or joint operating agreements or other arrangements to which Seller and such others are parties and which such other parties have not, or from time to time do not, elect to take in kind or otherwise to dispose of. However, there are reserved by Seller from the terms of this agreement such quantities of gas as are or may be reserved at the well to Seller's leaseholders for the use of the lessors in such leases and such gas as Seller may use in the Gwinville Gas Field for drilling of wells, pumping of oil wells, gas lift and other field operations and domestic use in offices, warehouses and employee residences. Seller shall also have [fol. 45] the right to use gas produced from lands and leaseholds subject to this agreement for cycling operations in the Gwinville Gas Field when permitted or required to do so by any regulatory body having jurisdiction thereof, provided that such cycling operations shall be conducted to the extent permitted by applicable laws and regulations and the requirements of safe and efficient methods of operation in such manner as to provide a quantity of gas equal to that which Buyer has a right to purchase hereunder.

Seller agrees promptly after the execution hereof to furnish Buyer a list of Seller's leases in the Gwinville field on which production has been required and a description of the acreage covered by such leases which has been assigned to producing wells, and to supplement said list and description from time to time as additional wells are drilled and additional acreage is proven to be productive.

Article II

Delivery of Gas

Seller shall install and operate at each of its wells a standard gas-oil separator to separate the liquid hydrocarbons and other fluids and foreign matters contained in the gas produced from each well, and all gas sold and purchased hereunder shall be delivered by Seller to Buyer at the outlet of each such separator. Seller shall be in control and possession of such gas and liable and responsible therefor up to such point of delivery, and Buyer shall assume all cost and expense in connection with the gathering and [fol. 46] transportation of such gas and all liability and responsibility therefor from and after such point of delivery. Seller may operate such separators in any manner which in the opinion of Seller is necessary to the separating, recovering or extracting of oil, condensate, liquid hydrocarbons, fluids, and other matters from the gas, and all of such products separated, recovered and extracted in said separators by Seller shall remain the property of Seller.

Article III

Buyer's Facilities

Buyer agrees to undertake with diligence the construction of whatever gathering system, pipe lines and other facilities may be necessary for it to receive and purchase gas from Seller hereunder, including the securing of any certificate of public convenience and necessity which may be necessary for such system, lines and facilities, and upon completion thereof Buyer agrees to maintain and operate same in a good and workmanlike manner. Notwithstanding any other provisions hereof, should Buyer not complete its facilities and commence the taking of gas hereunder on or before January 1, 1948, or the paying for gas hereunder which is not taken, Seller shall have the right and option to cancel and terminate this agreement. Buyer also agrees to extend its facilities from time to time to include connections to each additional well from which gas may be delivered hereunder as drilled and completed in the field by or for Seller which is capable of delivering, under

the provisions of this agreement, not less than one (1) million cubic feet of gas per day. Buyer may, if it elects, ex- [fol. 47] tend its facilities to any well completed by Seller in the field which is not capable of delivering such a quantity of gas, and if Buyer does not elect to do so within a reasonable time after such well is completed, Seller shall have the right to construct sufficient lines to connect such well to Buyer's facilities, and in either event such well, when so connected by Buyer or Seller, shall thereafter be subject to the terms and provisions of this agreement. Seller, to the extent that it may lawfully do so, hereby grants to Buyer right of ways and easements (with rights of ingress and egress thereto and therefrom) for the construction, maintenance and operation of Buyer's gathering system, pipe lines and facilities over and across the lands and leaseholds of Seller in the Gwinville Gas Field.

Article IV

Quantities of Gas

Subject to such quantity of gas being available, Buyer agrees that it will take from the Gwinville Field during each period of twelve consecutive calender months commencing with the period beginning on the first day of the month following the month in which gas shall first be delivered hereunder, a minimum of twenty per cent (20%) of its total line requirements. At Buyer's option, Buyer may increase its takings from the Gwinville Field up to a minimum of thirty per cent (30%) of its total line requirements by giving Seller six (6) months' advance written notice of its intention so to do. By "line requirements" is meant:

[fol. 48] (a) All of the gas which may be required by Buyer for delivery for consumption in, or for sale from, Buyer's pipe line facilities as same are now constituted in the states of Mississippi (East of Pickens, Mississippi), Alabama, Tennessee and Georgia, or as same may be enlarged, extended or expanded in such states or in or to other states along the Eastern seaboard of the United States;

(b) All of the gas which may be lost from Buyer's pipe line in transit; and

(c) All of the gas which may be used by Buyer in the operation of compressor stations and/or otherwise on Buyer's pipe line.

Of such requirements during each twelve (12) consecutive calendar month period, Buyer agrees to take and receive from Seller and to pay Seller for, or to pay Seller for if not taken, Seller's proportionate part of such requirements on an acreage basis. Seller's proportionate part of Buyer's requirements shall be determined by the ratio or proportion which the total number of acres of land owned, leased or controlled by Seller and included within drilling units established by agreement or by the rules or orders of any regulatory body having jurisdiction on which a producing well or wells in the Gwinville Field shall be located, bears to the total number of acres included within such drilling units in said field on which are located a producing well or wells from which Buyer is taking gas.

For the purpose of determining Seller's proportionate part of Buyer's requirements as provided for above in this [fol. 49] Article IV, Seller's percentage participation shall be determined each month on an acreage basis as above provided, and Seller agrees that the monthly percentages so determined will be averaged over each twelve month period to determine Seller's annual participation under this contract. Any changes in Seller's participation brought about by supplemental lists furnished by Seller as provided in the last paragraph of Article I hereof will become effective on the first day of the calendar month following the date of receipt by Buyer of such supplemental lists.

Buyer shall have the right to take and purchase from Seller hereunder at any time, and from time to time, a daily quantity of gas equal to one hundred fifty per cent (150%) of the minimum in effect on the date of purchase which Buyer is obligated to purchase from Seller hereunder. Buyer shall furnish Seller periodic statements at least each three (3) months as to the amount of gas constituting Buyer's line requirements since the last statement was furnished, and Seller shall be entitled to verify the

correctness of such statements by checking Buyer's books and records pertaining to such requirements. At the time of furnishing Seller such periodic statements as to the amount of gas constituting Buyer's line requirements, Buyer shall furnish Seller, in addition thereto, statements showing the productive acreage of others from whom Buyer is purchasing gas in the Gwinville Field, so that Seller may check the accuracy of Buyer's percentage determinations.

It is recognized that there will be some fluctuation in Buyer's takings of gas under this agreement, and in measuring Buyer's compliance with the foregoing obligation, [fol. 50] Buyer's purchases of gas hereunder shall be measured over the respective annual periods specified above; provided, however, that Buyer agrees, notwithstanding any of the foregoing provisions of this article, to take and receive hereunder, from each of Seller's wells in the Gwinville Field to which Buyer's facilities are connected and which is capable of delivering gas hereunder, a reasonable quantity of gas during each calendar month this agreement is in effect so that Seller may produce gas in paying quantities from each of its wells in the Gwinville Field during each month this agreement is in effect, and to the extent that its operating conditions and market outlet will allow, Buyer will exercise reasonable diligence to take and receive gas currently hereunder from Seller at as uniform a rate as is possible. Buyer further agrees to give Seller as much advance notice as Buyer can reasonably give of substantial changes in its takings of gas under this agreement. In this connection, Buyer agrees that, if Seller has available gas produced from any well in which Seller has an interest but where there is another purchaser of gas produced from such well, Buyer will take and purchase currently all of Seller's portion of the gas produced from such well, and Buyer will make the necessary arrangements to carry out its obligation to do so.

At the end of each annual period specified above, the minimum quantity of gas which Buyer is obligated to purchase hereunder during such period shall be determined, and if the quantity of gas purchased by Buyer during such period is less than such minimum quantity, Buyer

agrees to pay Seller for such deficiency, provided that dur-
[fol. 51] ing such period such minimum quantity of gas was available to Buyer hereunder from Seller's lands and leaseholds.

Buyer and Seller recognize that, in the operation of Buyer's pipe line, it is necessary for Buyer to have knowledge in advance as to the quantities of gas which will be available to Buyer both annually and at periods of maximum demand. On or after February 1, but not later than March 1, of any year during the term of this agreement, Buyer may request Seller to furnish Buyer with evidence relating to Seller's ability to deliver gas hereunder during each of the three twelve-month periods following November 1 of the year in which such notice is given. Such notice shall include an estimate by Buyer which shall give reasonable effect to all pertinent factors of the amount of the annual line requirements of Buyer as hereinabove defined for each of the three twelve-month periods following November 1 of the year in which such notice is given and of the maximum daily amount of the line requirements during each such period. Such evidence to be furnished by Seller to Buyer shall include a statement of the number of acres owned or leased by Seller in the Gwinville Field, the number of wells located on such acreage, the productive capacity (both actual and legally allowable) of such wells, an estimate as to the gas reserves recoverable from such acreage, Seller's contractual or other obligations to deliver gas from such acreage to persons other than Buyer, and such other data as may have a bearing on Seller's ability to deliver gas hereunder. Such evidence shall be submitted to Buyer within ninety (90) days after the receipt by Seller of notice from Buyer as aforesaid. Unless from the evidence so submitted it appears reasonably certain [fol. 52] that Seller will be able to deliver the quantity of gas provided to be delivered under the provisions of this agreement during each of the three twelve-month periods following November 1 of the year in which such notice is given, Buyer at its option, exercisable within three (3) months after the receipt of such evidence may, on six (6) months' written notice to Seller, reduce Buyer's minimum obligation under this agreement then in effect, effective as

of the first day of any month after the expiration of such six (6) month period, to a minimum quantity of gas equal to sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of the quantity of gas which it appears reasonably certain Seller will be able to deliver on any day during the last of such three twelve-month periods, unless within such six (6) month period Seller increases, or furnishes evidence of its ability to increase, within a reasonable time, its ability to deliver gas hereunder sufficiently to enable Seller to deliver the quantity of gas provided to be delivered under the provisions of this agreement during such three twelve-month periods.

In determining from the evidence so submitted whether Seller will be able to deliver the quantity of gas provided to be delivered hereunder during each of the three twelve-month periods above referred to, due consideration shall be given to the plans of Seller, if any, submitted as a part of such evidence for future development of its sources of supply or for the unitization of lands, leases or gas purchase contracts, provided that such plans contemplate their consummation with reasonable promptness and that the evidence of the same is verified by some responsible officer of Seller.

[fol. 53] It is also understood and agreed that, notwithstanding any provision of this agreement, Seller shall not be obligated to produce its wells at a rate in excess of that allowed by applicable proration schedules, or at a rate which in Seller's opinion will be detrimental to the ultimate recovery of gas from Seller's lands and leaseholds in the field. Subject, however, to the foregoing provision of this article, Seller agrees to use reasonable diligence to drill and equip, in a good and workmanlike manner, a sufficient number of wells on its lands and leaseholds in the field to supply Buyer with the quantity of gas sold and purchased hereunder.

Seller shall also have the right to sell to others and otherwise to dispose of gas produced from lands and leaseholds subject to this agreement in excess of the maximum quantity which Buyer has the right to purchase hereunder. Seller shall also have the right, without regard to the foregoing provisions of this article, to sell to others or otherwise to

dispose of sufficient gas produced from its lands and leaseholds subject to this agreement, to protect Seller's correlative rights in the gas reservoir in the Gwinville Field, to give Seller its pro rata share of the gas produced from the field, and to protect Seller's lands and leaseholds from drainage by wells on adjacent premises.

Article V

Quality of Gas

Subject to the provisions of Article VII hereinafter contained, the gas sold and purchased hereunder shall be gas [fol. 54] produced in the natural state from a well which, if classified under the laws or the rules or orders of a regulatory authority of the State of Mississippi, is not classified as an oil well, and in the absence of such classification such gas sold and purchased shall be gas which is not associated or blended with crude petroleum oil at the time of production from the well. Subject to the later provisions hereof concerning construction of a plant for the extraction of gasoline and other liquid hydrocarbons, such gas shall include all liquids or liquefiable hydrocarbons contained therein except those recovered by Seller in its separators.

Buyer shall not be obligated to purchase any gas (including gas purchases pursuant to the terms of Article VII hereof) containing more than twenty (20) grains of sulphur nor more than one and one-half (1½) grains of hydrogen sulphide to each one hundred (100) cubic feet of gas, and all gas delivered by Seller to Buyer hereunder shall be reasonably free of objectionable liquids and solids.

Article VI

Delivery Pressure

All gas delivered by Seller to Buyer hereunder, except gas purchased under the terms of Article VII hereof and except such gas as Buyer elects to take at a lesser pressure, shall be delivered at a pressure of not less than one thousand fifty (1050) pounds per square inch gauge pressure so long as the natural flowing pressure of Seller's wells is sufficient to enable Seller to make delivery at such pressure. In the

[fol. 55] event it appears that the natural flowing pressure of any or all of Seller's wells, delivery from which is needed in order to deliver to Buyer the quantity of gas Buyer is purchasing hereunder (except wells delivering gas under the terms of Article VII hereof), is about to decline to a pressure less than that which will permit gas from Seller's wells to enter Buyer's transmission facilities at the pressure at which such facilities shall at the time be operated (not, however, in excess of an initial pressure of one thousand (1,000) pounds per square inch gauge pressure), or in the event that Seller shall have installed a liquid recovery plant as hereinafter provided and shall deliver gas to Buyer at a pressure of less than one thousand (1,000) pounds per square inch gauge pressure, then in either event Buyer shall install facilities to compress gas delivered to it hereunder prior to its introduction into Buyer's facilities. In such event, and effective as of the date of commencement of the operation of such compression facilities, the price payable for all gas delivered hereunder by Seller produced from wells connected, or which may thereafter be connected, to such compression facilities, shall be reduced by one-half cent (½c) per thousand (1,000) cubic feet.

In the event Buyer shall install compression facilities as above provided, then Buyer shall operate same for the compression of gas delivered hereunder during the remainder of the term of this agreement and shall provide such additional compressors, if any, as may be necessary in order for Buyer to take gas hereunder; provided, however, that, except in connection with gas purchased under the terms of Article VII hereof, in the event the natural flowing pressure [fol. 56] of any or all of Seller's wells shall decline to a point which will not permit the delivery of gas to the intake or suction side of such compression facilities at a pressure of at least five hundred (500) pounds per square inch gauge pressure, then Buyer may at its option, exercisable on ninety (90) days' written notice to Seller, cancel and terminate this agreement as to any or all of such wells.

Buyer shall give Seller not less than sixty (60) days' written notice of its intention to install compression facilities as above provided

Article VII

Purchase of Gas Associated With Oil

Notwithstanding any other provision of this agreement (other than the minimum and maximum provisions of Article IV above), if one or more of Seller's wells or wells in which Seller has an interest, in the Gwinville Gas Field, are classified as an oil well, or if the gas produced from any of such wells is associated or blended with crude petroleum oil at the time of production, Buyer agrees, at Seller's option and upon written request from Seller, to take and purchase from Seller, under this agreement, all of such gas which Seller may have available for sale. If Seller exercises such option, Buyer will lay and construct, with the approval of Seller, the necessary gathering lines, compressors and all other equipment necessary for it to take and receive the gas into its gathering system, regardless of the quantity of such gas available in any particular well or of the pressure at which such gas is produced. Seller [fol. 57] agrees to reimburse Buyer at monthly intervals for the actual expenses (including a reasonable amount for overhead) incurred by Buyer in connection with the operation of such lines, compressors and equipment for the gathering and compressing of the gas purchased under this article, together with a reimbursement for depreciation or amortization upon the construction costs of such lines, compressors and facilities at a reasonable rate based upon due regard for Seller's available gas reserves, and a payment sufficient to give Buyer a six per cent (6%) return on Buyer's actual investment in constructing such lines, compressors and equipment. Buyer shall keep an accurate and separate record of its costs and expenses incurred in this connection and will render Seller monthly statements showing in detail the amount and nature thereof. The payment by Seller of the amount due to Buyer under the terms of this article pursuant to such statements shall not preclude Seller from challenging the accuracy thereof, and Seller shall have the right at all reasonable times to inspect and audit Buyer's books and records pertaining to such costs and expenses in order to determine the accuracy of such statements. Should Seller not exercise its option to have

Buyer take and purchase such gas, Buyer shall have the right to take and purchase such gas at Buyer's expense.

All of such gas so taken and purchased by Buyer shall be considered in the application of the minimum and maximum provisions of Article IV above. Seller shall have the right to take or to sell to others the oil, condensate and other liquid hydrocarbons recovered by Seller in its separators or traps located at or near the wellhead, and Buyer [fol. 58] shall deliver to Seller, as Seller may direct, at the compression facilities, all liquid hydrocarbons recovered by Buyer from the gas purchased under this article.

Article VIII

Warranty of Title

Seller hereby warrants the title to all gas delivered to Buyer hereunder, Seller's right to sell and deliver same, and that it is free of all liens and adverse claims, including liens and claims for royalties or other similar charges, and to indemnify Buyer against all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of any adverse legal claims of any and all persons to or against said gas, if notified thereof by Buyer. Seller shall pay to the proper parties all amounts which may be due for royalties or any other interests in said gas and all taxes payable on said gas by Seller under the terms of Article XII hereof.

No conveyance, transfer or assignment of any interest of Seller shall be binding upon Buyer until Buyer has been furnished with a certified copy of such conveyance, transfer or assignment.

Article IX

Meters

With each well connected to its gathering system, Buyer agrees to install, operate and maintain in accurate repair suitable orifice meters and other appropriate equipment for the measurement of all gas delivered to it hereunder. Seller [fol. 59] to the extent it may lawfully do so, hereby grants to Buyer an easement covering a tract of land approximately one hundred by fifty feet and located at a point to

be mutually agreed upon by the parties approximately two hundred feet distant from each well for the purpose of installing, maintaining, repairing and removing any and all measuring and other equipment installed by Buyer, together with the right of ingress and egress over any and all contiguous lands and leaseholds of Seller so that Buyer may at all times have access to the tract of land on which Buyer shall install its equipment.

All meters installed by Buyer shall be equipped appropriately for the computation of volumes of gas in the manner hereinafter provided.

Buyer shall read the meters daily, or as often as may be necessary, and shall make periodic tests of said meters at least once each thirty (30) days and more often as Buyer may deem necessary. Seller shall have the right to challenge the accuracy of any meter and, when challenged, such meters shall be tested and, if necessary, repaired by Buyer. The cost of such special test shall be borne by Buyer if the percentage of inaccuracy is found to be more than two per cent (2%); but if the percentage of inaccuracy is found to be two per cent (2%) or less, the cost of such special test shall be borne by Seller. If any meter is found on any test to be inaccurate by more than two per cent (2%), then correction shall be made at the rate of such inaccuracy for the period which is definitely known and agreed upon, and in case such period is not definitely known and agreed upon, [fol. 60] then for a period extending back one-half of the time elapsed since the last date of calibration.

Readings, calibrations and adjustments of meters and the changing of charts shall be done by employees or agents of Buyer, but Seller shall at all reasonable times have access to the metering equipment and the charts and records therefrom, which shall remain the property of Buyer. Such charts and records shall be kept on file by Buyer for such a period as may be required by law or the rules of any regulatory authority having jurisdiction, after which time they may be destroyed at Buyer's option.

Seller may at its option and expense install and operate such meters as Seller may desire, to check Buyer's meters; but measurement of gas for the purpose of this agreement shall be by Buyer's meters.

Article X

Measurement

The unit of measurement for the purpose of this agreement shall be one thousand (1,000) cubic feet of gas, computed as hereinafter provided.

A cubic foot of gas shall mean the amount of gas necessary to fill a cubic foot of space when the gas is at a base pressure of two (2) pounds gauge pressure above 14.7 pounds per square inch atmospheric pressure and at a base temperature of sixty degrees (60°) Fahrenheit, and volumes of gas shall be computed into such units in the manner described below.

[fol. 61] Recognizing that the atmospheric pressure may vary somewhat from time to time and that the average atmospheric pressure is approximately 14.7 pounds per square inch, it is agreed that the atmospheric pressure shall be assumed to be 14.7 pounds per square inch regardless of the actual atmospheric pressure at which gas is measured and delivered. It is likewise agreed that the gas shall be assumed to obey Boyle's Law, and no correction shall be made for any deviation from this law.

The orifice coefficient for each meter shall be calculated at the above base pressure and base temperature and a flowing temperature of sixty degrees (60°) Fahrenheit and for a gas of sixty hundredths (.60) specific gravity. Pressure taps for orifice meter installations shall be taken from the orifice flange.

The temperature of the gas shall be determined by the use of a recording thermometer so installed that it may properly record the temperature of the gas flowing through each meter. The average temperature recorded shall be used in computing measurements, and the orifice coefficient shall be corrected for variation in the average temperature from sixty degrees (60°) Fahrenheit.

The specific gravity of the gas shall be determined by spot tests made with an Edwards type gas balance, or such other method as may be agreed upon between the parties, said tests to be made as frequently as is found necessary in practice. Each test so made shall determine the specific gravity to be used in the computation of the volume of gas

delivered during the succeeding billing months until the [fol. 62] next test. The orifice coefficient shall be corrected for variation in specific gravity from sixty hundredths (.60).

All orifice meter computations shall be made in accordance with formulas as set forth in the Natural Gas Handbook by John C. Diehl, 1927 Edition, with the use of coefficient tables contained in pages 143 and/or 145, corrected to the base pressure provided for above in this Article X.

Article XI

Price

Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price

(1) of seven and one-half cents (7½c) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof;

(2) of eight cents (8c) for each one thousand 1,000) cubic feet of gas during the second five (5) years of said term.

In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; and should the Federal Power [fol. 63] Commission or any other Federal, State or other governmental regulatory body undertake to reduce the price which Seller is to receive under this agreement, or directly or indirectly to take any action which would bring about such a result, then in such an event Seller at its option may cancel and terminate this agreement upon thirty (30) days' written notice to Buyer of its intention so to do. In the event Seller exercises the option granted to it in this paragraph, Seller shall reimburse Buyer for the unamortized value, on the date of cancellation of that portion of Buyer's gathering system installed by Buyer for the exclusive purpose of taking gas from Seller hereunder.

Such unamortized value shall be determined by deducting from the actual cost to Buyer of such portion of said system an amount equivalent to the volume of gas purchased by Buyer from Seller hereunder prior to the date of cancellation by a price of one-half cent (½c) per thousand (1,000) cubic feet of such gas. The failure of Seller to exercise such option in one or more instances shall not be a waiver of Seller's rights and option in other instances.

On or before the twentieth day of each calendar month, Buyer shall make payment to Seller of the amount due by Buyer for gas purchased hereunder during the preceding calendar month. Such payment shall be accompanied by a statement of the amount of gas delivered hereunder during such preceding month, and at Seller's request Buyer will furnish Seller supporting meter charts and records substantiating such payment, which charts and records shall be returned to Buyer within ten (10) days after receipt by Seller.

[fol. 64] Should Buyer fail to pay any amount due to Seller when same is due, interest thereon shall accrue at the rate of six per cent (6%) per annum from the date when such amount was due until same is paid. If any failure to make payment continues for sixty (60) days, Seller may suspend deliveries of gas hereunder, but the exercise of such rights shall be in addition to any other remedies available to Seller.

Article XII

Taxes

All existing severance and production taxes and assessments or other charges upon the production of gas or sale of gas by Seller to Buyer under this agreement shall be paid by Seller, and all taxes, assessments and other charges upon the gathering, transportation, sale and use of such gas after its delivery to Buyer hereunder shall be paid by Buyer. Any increases in existing severance and production taxes, assessments or other charges upon the production of gas or sale of gas by Seller to Buyer hereunder shall be assumed equally by Seller and Buyer, with Seller paying such taxes and Buyer reimbursing Seller for the portion thereof assumed by Buyer in connection with Buy-

er's payments for gas purchased hereunder; provided, however, that should such increase or increases applicable to each party aggregate more than one cent (1c) for each one thousand (1,000) cubic feet of gas sold and purchased hereunder, then either party shall have the right to cancel and terminate this agreement upon thirty (30) days' written notice to the other, unless the party so notified elects, within such thirty-day period, to assume that portion of [fol. 65] such aggregate increase of the party giving the notice in excess of one cent (1c), or unless the parties mutually agree upon some basis for allocating such excess.

Article XIII

Extraction of Hydrocarbons

Seller reserves the right and option to extract, or to cause to be extracted, in a plant located in or near the Gwinville Field, the liquid hydrocarbons contained in the gas, subject to this agreement, in addition to those which may be recovered by the separators installed by Seller in accordance with the provisions hereof. All liquid hydrocarbons so extracted shall belong to Seller. In the event that Seller exercises such option, the point of delivery of gas hereunder shall, in lieu of the several points of delivery provided for elsewhere herein, be a point of connection between the facilities of the plant in which Seller is extracting or causing to be extracted such liquid hydrocarbons and the facilities of Buyer located at or near the tail gate of said plant. In such event also, if there is any gathering tax imposed upon Seller by virtue of Seller's exercise of such option, it is agreed that Buyer will reimburse Seller for one-half of the amount of such tax.

Article XIV

Term

Subject to the various termination options given the parties hereto by the terms hereof, this agreement shall remain in force and effect for a period of ten (10) years, [fol. 66] commencing on the date on which the first delivery of gas is made by Seller to Buyer hereunder.

Article XV

Force Majeure

Except for the termination privilege given to Seller on Article III hereof for Buyer's failure to commence taking or paying for gas on or before January 1, 1948, if either party is rendered unable, wholly or in part, by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party's giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides lightning earthquakes fires storms floods, washouts, arrests and restraints of governments and people, civil disturbances explosions breakage or accident to machinery or line of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire [fol. 67] failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a), in those instances where any party hereto is required to obtain servitudes, right of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, right of way grants, permits or licenses, and (b), in those instances where any party hereto is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permission

from any governmental agency to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.

It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

[fol. 68]

Article XVI

Regulatory Requirements

This agreement shall be subject to all present and future valid rules, regulations and orders of any regulatory body having jurisdiction, and shall be construed in accordance with the laws of the State of Mississippi; provided, however, that this Article XVI shall be without prejudice to Seller's right to cancel this agreement as provided in Article XI above.

Article XVII

Notices

All notices hereunder, except with regard to the dispatching of gas, shall be deemed to be duly given or delivered if in writing and sent by postpaid registered mail addressed to the respective parties at the addresses stated below, or such other addresses as they shall respectively hereafter designate in writing.

Sun Oil Company,
First National Bank Building,
Dallas 1, Texas.

Southern Natural Gas Company,
P. O. Box 2563,
Birmingham, Alabama.

[fol. 69]

Article XVIII

Assignability

This agreement shall be binding upon, and the benefits hereof shall extend to, the successors and assigns of the respective parties hereto.

In Witness Whereof, this agreement has been executed in duplicate originals this 26th day of August, 1947, by Seller and by Buyer by its officers duly authorized.

SUN OIL COMPANY,
By J. HOWARD PRESSLEY,
Agent and Attorney in Fact,
Seller.

SOUTHERN NATURAL GAS
COMPANY,
By (Illegible),
President,
Buyer.

Attest:

(Illegible),
Secretary.

The State of Texas,
County of Dallas. ss.

Before the undersigned officer in and for said State and County duly authorized to administer oaths to take acknowledgments to deeds, personally came and appeared J. Howard Pressley, Agent, and Attorney in Fact for Sun Oil Company, a corporation of the State of New Jersey, who acknowledged to and before me that for and on behalf of said corporation he signed, executed and delivered the [fol. 70] foregoing instrument on the date therein written as the act and deed of said corporation, he being by said corporation duly authorized to do so.

Given under my hand and seal of office this the 3rd day of September, A.D., 1947.

MILDRED C. DESPAIN,
(Mildred C. DeSpain),
Notary Public in and For
Dallas County, Texas.

(Seal)

The State of Alabama,
County of Jefferson. ss.

Before the undersigned officer in and for said State and County duly authorized to administer oaths and to take acknowledgments to deeds, personally came and appeared C. P. Rather, President of Southern Natural Gas Company, a corporation of the State of Delaware, who acknowledged to and before me that for and on behalf of said corporation he signed, executed and delivered the foregoing instrument on the date therein written as the act and deed of said corporation, he being by said corporation duly authorized to do so.

Given under my hand and seal of office this the 26th day of August, A.D., 1947.

MARGARET SCHNELL.

(Seal)

[fol. 71]

BEFORE THE FEDERAL POWER COMMISSION

Received Nov. 30, 1954.

FPC GAS RATE.
Schedule No. 55.
Supplement No. 1.

Filing Date: Nov. 30, 1954.
Effective Date: Accepted.

Southern Natural Gas Company
Watts Building
Birmingham 8, Ala.

Sup. 1.

September 10, 1953

Sun Oil Company
First National Bank Building
Dallas 1, Texas

Gentlemen:

We refer to agreement dated August 26, 1947 between you and the undersigned relating to the purchase of gas

from the Gwinville field, which provides (Article IV), in effect, that we will take a total quantity equal to a specified percentage of our Line Requirements, as defined, from the Gwinville field during each period of twelve consecutive calendar months commencing with the twelve months period beginning on the first day of the month following the month in which gas was first delivered under said agreement, and that we will purchase from you your proportionate part of such total quantity determined on the basis of the proportion of your developed acreage to the total developed acreage in the field from which we are taking gas. Said agreement further provides at the [fol. 72] end of each such twelve months period the minimum quantity of gas which we are obligated to purchase during such period shall be determined and, if the quantity so purchased is less than such minimum, we will pay you for the deficiency.

As you know, we are purchasing gas under agreements similar to that between you and us from several other producers in the Gwinville field. Delivery of gas under said agreements commenced at different dates and, consequently, the annual periods for the determination of the minimum quantity which we are obligated to purchase from the field are not the same. It would be a matter of considerable convenience to us if we could determine our minimum take obligations from the field on the basis of a twelve months period which would be the same under all of the contracts. A further reason for the use of a uniform twelve months period may be found in the fact that several of the sellers own acreage in units in which other sellers also own acreage. We believe that this change would not adversely affect the rights of any seller.

We, accordingly, request that the provisions of Article IV of said contract be amended so that the period for determination of the minimum quantity of gas which Buyer is obligated to purchase shall be the twelve month period commencing January 1 of each calendar year.

We are sending similar letters to Sun Oil Company, Tide Water Associated Oil Company, Texas Gulf Producing

Company, The British-American Oil Producing Company, Hunt Oil Company and S. W. Richardson. Our contracts [fol. 73] with Humble Oil & Refining Company and Magnolia Petroleum Company, from which we are also purchasing gas in the Gwinville field, provide that the twelve months period for the determination of minimum take obligations shall be the calendar year.

If the foregoing is agreeable to you, please so indicate by signing and returning to us the enclosed copy of this letter.

Yours very truly,

SOUTHERN NATURAL GAS COMPANY,
By H. D. McHENRY,
(H. D. McHenry),
Vice President.

Accepted and confirmed.

SUN OIL COMPANY,
By T. F. HILL,
Agent and Attorney in Fact.

[fol. 91]

BEFORE THE FEDERAL POWER COMMISSION

Gas & Distillate Statement

Received Nov. 30, 1954

S. W. Richardson
Fort Worth National Bank Building
Fort Worth, Texas
Operator: S. W. Richardson

Gwinville Gas Unit #6 (C. E. Berry #1)
Gwinville Field
Jefferson Davis County, Mississippi

Gas Sales to Southern Natural Gas Co.

Period	Volume—MCF	Gross Value	Tax Deduction	Net Value	
June, 1954	43,796	$3,567.39	$218.92	$3,348.67	$3,348.67

Gas used by S. W. Richardson to Drill B. D. Walker Well #1

Period	Volume—MCF	Gross Value	Tax Deduction	Net Value	
June, 1954	52,069	$4,240.30	$260.22	$3,900.28	$3,960.28

Distillate Sales to Esso Standard Oil Co.

Period	Barrels—MCF	Gross Value	Tax Deduction	Net Value	
June, 1954	553.08	$1,639.16	$100.37	$1,558.78	$1,558.78
					$8,887.73

[fol. 92] Distribution

Voit Gilmore	20/320 or .062500000	$ 355.48
Humble Oil & Refining Company	30/320 or .093750000	833.22
Magnolia Petroleum Company	33/320 or .103125000	916.55
Sun Oil Company	41.623/320 or .129765425	1,152.32
B. D. Walker	.024/320 or .000075000	.67
S. W. Richardson	196.451/320 or .610784376	5,428.49*
		$8,887.73

* Credited in accordance with Division Orders on File.

[fol. 100]

Received Oct. 10, 4 06 PM '57.

This Agreement, made and entered into this 1st day of August, 1957, by and between Sun Oil Company, a New Jersey corporation, hereinafter called "Seller", and Southern Natural Gas Company, a Delaware corporation, hereinafter called "Buyer",

Witnesseth, That:

Whereas, Seller is the owner of the oil, gas and mineral leases, and interests in oil, gas and mineral leases and/or production units described in Exhibit "A" attached hereto, situated in the Gwinville Field in Jefferson Davis and Simpson Counties, Mississippi:

Now, Therefore, in consideration of the premises and the mutual covenants herein contained, Seller and Buyer agree as follows:

Article I.

(Definitions.)

As used herein, the following terms shall have the meanings set forth below:

(a) FIELD—The area in Simpson and Jefferson Davis Counties, Mississippi, known as the Gwinville Gas Field as the same Field is presently defined or as the same may be entered by wells which hereafter may be drilled.

(b) FIELD OPERATIONS—The use in the Field by Seller of gas for: (1) discharging Seller's obligations [fol. 101] to its lessors as provided in its leases; (2) drilling of wells, pumping of oil wells, gas lift operations, and cycling operations when required or permitted by applicable statutes or by the rules or orders of any regulatory body having jurisdiction thereof; (3) use in offices, warehouses, employee residences; and (4) other miscellaneous uses connected with Seller's operations in the Field.

(c) CONTRACT YEAR—A full period of twelve (12) consecutive calendar months, the first contract year to begin at 7:00 o'clock, A.M., Central Standard Time, on

September 3, 1957, and to end at 7:00 o'clock, A.M., Central Standard Time, on September 3, 1958.

(d) DAY—A period of twenty-four (24) hours calculated from 7:00 o'clock, A.M., Central Standard Time, on one day to 7:00 o'clock, A.M., Central Standard Time, on the following day. The date of a day shall be that of its beginning.

(e) MCF—One thousand (1,000) cubic feet of gas calculated in the manner specified elsewhere in this agreement.

(f) PSIG—pound per square inch gauge pressure.

(g) BTU—A British Thermal unit.

Article II.

(Gas Sold and Purchased.)

SECTION 1. Subject to the terms and provisions hereof and during the term of this agreement, Seller agrees to [fol. 102] sell and deliver to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for, and to pay Seller for if available and not taken by Buyer, the volume of gas owned by Seller, hereinafter, capable of being produced from wells on Seller's Units, and interests in Units described in Exhibit "A" attached hereto in the Field and any additional lands or leases in the Field or interests therein which Seller may now own or hereafter acquire in said Field as said Field presently exists or hereafter may be extended. [JEP]

SECTION 2. Within the minimum and maximum quantities of gas hereinafter specified, and subject to the terms of Article VIII hereof, and except such gas as Seller shall require from time to time in its field operations, this agreement shall apply to all merchantable natural gas produced from leases now or hereafter [JEP] owned by Seller in said Field and Seller's proportionate share of all gas produced from lands, leases and production units owned by Seller and others, jointly. To the extent and during such times as non-operators owning interests in leases or production units operated by Seller are not

[fol. 93]

BEFORE THE FEDERAL POWER COMMISSION

Received Apr. 28, 10 12 AM '55.
FPC GAS RATE,
Schedule No. 55.
Supplement No. 2.
Filing Date: Apr. 28, 1955.
Effective Date 4-28-55-T.

Sun Oil Company
Southwest Division
Rio Grande National Building
Dallas 2, Texas

April 22, 1955

S. M. Gladney
Manager
T. F. Hill
Assistant Manager

Mr. Leon M. Fuquay, Secretary
Federal Power Commission
Washington 25, D.C.

Re: Sun Oil Company (Southwest Division) F.P.C. Gas Rate Schedule No. 55.

Dear Sir:

Sun Oil Company (Southwest Division) hereby files a change in the charges contained in the contract between Sun Oil Company and Southern Natural Gas Company, dated August 26, 1947, as therein provided for. Said contract has heretofore been filed as a rate schedule and has been designated Sun Oil Company (Southwest Division) F.P.C. Gas Rate Schedule No. 55.

[fol. 94] Such increase in charges is required because of the increase in the gas severance tax levied by the State of Mississippi, which increased tax became effective April 1, 1955. Accordingly, such change in charges takes effect under the terms of said contract as of April 1, 1955.

There are submitted herewith in accordance with Section 154.94 of the Commission's regulations, as amended by

Order No. 174-B, two copies of the comparative statement therein specified and two copies of a statement of the increased charges.

It is our understanding that the increase in gas severance tax did not become law until the legislative bill was signed by the Governor of the State of Mississippi on March 30, 1955. Moreover, Sun Oil Company was not officially notified of such change in the law until its receipt of official notice dated April 8, 1955. Therefore, it is requested that this change in charges be made effective on less than thirty days notice and in accordance with the effective date of such change provided in said contract, which effective date is April 1, 1955.

A copy of this letter and enclosures have been mailed to the purchaser.

With regard to this filing, address communications to: James E. Pew, Mgr., Natural Gas Dept., 1608 Walnut St., Philadelphia 3, Pa.; and B. E. Warren, P. O. Box 2880, Dallas, Texas.

This filing is made under compulsion of the Commission's Order No. 174-B without admitting the validity of such order and without admitting that the Federal Power Commission has jurisdiction over either Sun Oil Company or the subject matter of this filing, and without prejudice to the rights of Sun Oil Company to contest the validity [fol. 95] of said order, and without prejudice to its right to contest the jurisdiction of the Commission over the subject matter of this filing.

Yours very truly,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By B. E. WARREN,
(B. E. Warren),
Superintendent, Natural Gas Department.

BEFORE THE FEDERAL POWER COMMISSION

Received Jul. 5, 3:52 P.M., '55.

Sun Oil Company
Dallas, Texas

Gwinville Field—Jefferson Davis County, Mississippi
Sales to Southern Natural Gas Company

	(Compressed)			(Non-Compressed)		
Period	MCF Sold 16.7#	Price Per MCF 16.7#	Total Value	MCF Sold 16.7#	Price Per MCF 16.7#	Total Value
Apr., 1954	33,896	.076410	$2,590.00	232,168	.08150126	$18,922.00
May, 1954	33,621	.076410	2,569.00	283,910	.08150126	23,139.00
June, 1954	27,182	.076410	2,077.00	176,304	.08150126	14,369.00
July, 1954	30,363	.076410	2,320.00	167,556	.08150126	13,656.00
Aug., 1954	28,570	.076410	2,183.00	360,902	.08150126	29,414.00
Sept., 1954	22,615	.076410	1,728.00	330,842	.08150126	26,964.00
Oct., 1954	28,818	.076410	2,202.00	369,700	.08150126	30,131.00
Nov., 1954	24,905	.076410	1,903.00	358,853	.08150126	29,247.00
Dec., 1954	18,583	.076410	1,420.00	419,441	.08150126	34,185.00
Jan., 1955	17,956	.076410	1,372.00	398,951	.08150126	32,515.00
Feb., 1955	17,354	.076410	1,326.00	370,657	.08150126	30,209.00
Mar., 1955	17,354*	.076410	1,326.00	370,657*	.08150126	30,209.00
Apr., 1955	33,896*	.076744	2,601.31	232,168*	.081857	19,004.58
May, 1955	33,621*	.076744	2,580.21	283,910%	.081857	23,240.02
June, 1955	27,182*	.076744	2,086.06	176,304*	.081857	14,431.72
July, 1955	30,363*	.076744	2,330.18	167,556*	.081857	13,715.63
Aug., 1955	28,570*	.076744	2,192.58	360,902*	.081857	29,542.36
Sept., 1955	22,615*	.076744	1,735.57	330,842*	.081857	27,081.73
Oct., 1955	28,818*	.076744	2,211.61	369,700*	.081857	30,262.53
Nov., 1955	24,905*	.076744	1,911.31	358,853*	.081857	29,374.63
Dec., 1955	18,583*	.076744	1,426.13	419,441*	.081857	34,334.18
Jan., 1956	17,956*	.076744	1,378.02	398,951*	.081857	32,656.93
Feb., 1956	17,354*	.076744	1,331.82	370,657*	.081857	30,340.87
Mar., 1956	17,354*	.076744	1,331.82	370,657*	.081857	30,340.87

Period	(Compressed) MCF Sold 16.7#	Price Per MCF 16.7#	Total Value	(Non-Compressed) MCF Sold 16.7#	Price Per MCF 16.7#	Total Value
Apr., 1954	33,896	.076410	$2,590.00	232,168	.08150126	$18,922.00
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Jan., 1956	17,956*	.076744	1,378.02	398,951*	.081857	32,656.93
Feb., 1956	17,354*	.076744	1,331.82	370,657*	.081857	30,340.87
Mar., 1956	17,354*	.076744	1,331.82	370,657*	.081857	30,340.87

* Estimated

Note: Prices shown for 12 month period preceding April 1, 1955 include tax reimbursement for increased taxes prior to April 1, 1955.

[fol. 97]

BEFORE THE FEDERAL POWER COMMISSION

STATEMENT OF REASONS, NATURE AND BASIS FOR INCREASED PRICE.

Received Apr. 28, 10 12 AM '55.

(Southern Natural)

By an Act styled House Bill No. 15, Extraordinary Session of 1955 of the Mississippi Legislature, the privilege tax on the business of producing or severing gas in the State of Mississippi was increased from 6% of the value of the gas to 6.84% of the value of the gas.

The contract here involved (Sun Oil Company (Southwest Division) F.P.C. Gas Rate Schedule No. 55) expressly provides, and the parties thereto expressly agreed, that any and all such changes in the tax rate should be specifically accounted for between the parties thereto by a change in the charge at which the purchaser shall account to seller under the terms of said contract.

The nature and effect of said change in charge, as filed herewith, and as required by said contract and by said Act of the Legislature of the State of Mississippi, is to increase the charge at which purchaser shall account to seller for each 1000 cubic feet of gas delivered under said contract, on and after April 1, 1955, from 8.150126c per m.c.f. for non-compressed gas and 7.650126c per m.c.f. for compressed gas to 8.183726c per m.c.f. for non-compressed gas and 7.683726c per m.c.f. for compressed gas, measured at a pressure base of 167 p.s.i.a.

[fol. 98] This change in charge relates directly to an increase in the actual cost of furnishing gas under the contract and represents a cost item which could not have been anticipated in such manner as to be included in the base price. The change in charge reflects the application of provisions of said contract which were negotiated in good faith at arm's length. However, the total charge as so increased does not exceed the present fair value or market value of gas in the field in which the property covered by said contract is located.

[fol. 99]

BEFORE THE FEDERAL POWER COMMISSION

FPC GAS RATE.
Schedule No. 87.

Filing Date: 10-10-57.
Effective Date: Suspended.

Received Oct. 10, 4 05 PM '57.

Agreement Dated August 1, 1957 Between Sun Oil Company and Southern Natural Gas Company

Providing for the Sale and Purchase of Gas From the Gwinville Field, Mississippi.

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taking their shares of the gas production therefrom in kind or otherwise disposing of the same, this agreement shall apply to such non-operators' shares of such gas production on a day to day basis, to the extent that Seller may have the right under its pooling, unitization or joint operating agreements with such non-operators to market their shares of gas production in such manner.

SECTION 3. Subject to the other provisions hereof, Buyer agrees to purchase and take during each contract [fol. 103] year, or to pay Seller for if not taken, an average daily quantity of gas equal to 66⅔% of the deliverability of Seller's wells covered hereby (determined in the manner hereinafter specified), hereinafter called "minimum annual take". Buyer further agrees to take from each of Seller's wells covered hereby during each month a reasonable quantity of gas (if and to the extent that gas is available from such well and tendered for delivery hereunder) to the end that Seller may produce gas in paying quantities from each of its wells in said Field during each month and Buyer agrees to take gas at as uniform a rate from time to time as is practicable, having regard to variations in Buyer's requirements.

SECTION 4. Seller agrees, subject to the other provisions hereof, to make available to Buyer on each day a quantity of gas equal to 100% of the total deliverability of Seller's wells covered hereby, as determined for the then current contract year in the manner hereinafter specified, such daily quantity being herein called "maximum daily take".

SECTION 5. Seller and Buyer agree that the deliverability of Seller's wells, for the purpose of determining the quantities of gas Buyer is required or permitted to take hereunder, shall be the amount of gas each well is capable of producing as determined by production tests (conducted pursuant to the rules of the Mississippi Oil & Gas Board) to be made between November 1 and December 31 of each year to be effective during the following calendar year; provided, however, should any new well or wells be completed in the presently known reservoirs or

should any well of Seller be reworked or reconditioned [fol. 104] during any year in such manner as to require a special production test, the deliverability of such well shall be its deliverability as reflected by such special test, effective as soon as practicable and until the results of the next following annual deliverability test hereunder become effective. Seller's total deliverability, as so determined, shall be the total of the deliverability of all of its wells, its proportionate part of the deliverability of wells on leases or units jointly owned by Seller and others, and the proportionate part of the deliverability of wells operated by Seller allocable to gas produced therefrom which Seller has the right from time to time to market on a day to day basis during such times as such right to market exists.

For the period prior to January 1, 1958, the results of the last test made prior to December 1, 1957 shall apply until the first annual tests become effective as above provided.

In the event the Mississippi Oil & Gas Board shall cease to require production tests, to become effective January 1 of each year (or some other test equally acceptable to both Seller and Buyer), upon which the determination of the deliverability of Seller's wells is based hereunder, Seller and Buyer agree that they will continue to conduct joint tests similar to those currently required by said Board, to be made annually during the period between November 1 and December 31, or such other period as may be mutually agreed upon, and that such joint tests shall be the basis for determining the rights and obligations of the parties hereunder.

[fol. 105] In the event Buyer shall purchase gas from others in said Field and the basis of determining the volumes of gas which Buyer shall have the right to take from the wells of such parties is not the same as that used hereunder, or if the circumstances under which such tests are made are not identical with the circumstances under which the deliverability of Seller's wells is determined, Buyer agrees to adjust Seller's deliverability to compensate for the diverse test conditions and to take

ratably as between Seller and other producers in such Field from which Buyer may purchase gas.

In taking ratably as between Seller and such other producers in the Field, Buyer shall consider not only the deliverability of wells but also the acreage and allowables assigned to wells and such other available information and data as may be pertinent to such determination.

SECTION 6. In the event Buyer shall fail to take (unless such failure is excused under the provisions of the force majeure clause hereof; during any contract year a quantity of gas equal to the minimum annual take for such year, Buyer shall within sixty days after the end of such year pay Seller, at the price applicable during such year, for a quantity of gas equal to the difference between the minimum annual take for such year and the quantity taken during such year, such difference to be reduced, however, by the aggregate of the quantities (up to the maximum daily take) which Buyer elected to take on any days during such year and Seller failed for any reason to deliver. Such payment, if made, shall be credited against amounts due for gas taken each year during the next [fol. 106] two contract years in excess of the applicable minimum annual take for each of such two ensuing contract years until the aggregate of such credits equals the amount of such payment; however, that this provision shall not operate to extend the term of this agreement as the same is fixed elsewhere herein.

SECTION 7. It is expressly understood and agreed that the provisions of this Article II fixing the deliverability of Seller's wells as the basis for determining the minimum annual take and the maximum daily take are intended to apply only to the presently known reservoirs underlying the leases and/or production units described in Exhibit "A". In the event that production shall hereafter be obtained by Seller on its leases in said Field which are from time to time subject to this agreement, from a reservoir or reservoirs other than the presently known reservoirs, Seller and Buyer shall agree upon a reasonable basis for Buyer's minimum and maximum takes from such after discovering and/or developed additional

gas reserves. Anything in this agreement contained to the contrary notwithstanding, without limitation of the generality, and specifically notwithstanding the provisions of Article XVI hereof, no deliveries hereunder of gas produced from such additional reserves shall be required or made without the written consent of Seller until Seller and Buyer have agreed in writing on a withdrawal formula applicable to such additional reserves. A separate withdrawal of gas from each such additional reservoir in said Field from which gas may be produced from the leases subject to this agreement, at the option of Seller.

[fol. 107] SECTION 8. If one or more of Seller's wells or wells in which Seller has an interest in the Gwinville gas field are classified as oil wells, or if the gas produced from any of such wells is associated or blended with crude petroleum oil at the time of production (the gas from such wells being herein called "oil well gas"), Buyer agrees to take and purchase from Seller, and Seller agrees to sell and deliver to Buyer, under this agreement (in addition to the quantities provided for above in this Article II such daily quantity of such oil well gas as, in Seller's judgment, Seller has available for sale up to the greater of (i) 5,000 Mef or (ii) [JEP] six and two-thirds (6⅔) percent of the maximum daily take as defined in Section 4 above, at the time in effect.

Buyer further agrees to use its best efforts, having regard to the capacity of Buyer's facilities, to take such additional quantities of oil well gas as Seller from time to time may have available for delivery hereunder. If, however, Buyer is unable to take such quantity as will avoid the flaring of gas, or the reduction of Seller's oil well allowables, then Buyer shall, upon Seller's request, release all oil well gas from the provisions of this agreement.

If Seller sells oil well gas to Buyer hereunder, Buyer will lay and construct, with the approval of Seller, the necessary gathering lines, compressors and all other equipment necessary for it to take and receive the oil well gas into its gathering system, regardless of the quantity of such gas available in any particular well or of the pressure

at which such oil well gas is produced. Seller agrees to reimburse Buyer at monthly intervals for the actual ex-
[fol. 108] penses (including a reasonable amount for overhead) incurred by Buyer in connection with the operation of such lines, compressors and equipment for the gathering and compressing of the oil well gas purchased under this Section 8, together with a reimbursement for depreciation or amortization upon the construction costs of such lines, compressors and facilities at a reasonable rate having due regard for Seller's available oil well gas reserves, and a payment sufficient to give Buyer a six per cent (6%) return on Buyer's actual investment in constructing such lines, compressors and equipment. Buyer shall keep an accurate and separate record of its costs and expenses incurred in this connection and will render Seller monthly statements showing in detail the amount and nature thereof. The payment by Seller of the amount due to Buyer under the terms of this Section 8 pursuant to such statement shall not preclude Seller from challenging the accuracy thereof, and Seller shall have the right at all reasonable times to inspect and audit Buyer's books and records pertaining to such costs and expenses in order to determine the accuracy of such statements. Should Seller not desire to reimburse Buyer as provided in this paragraph, then Buyer, upon request of Seller, shall either release all oil well gas from the obligations of this agreement or shall have the right at its option to take and purchase all such oil well gas at Buyer's expense. [JEP]

Seller shall have the right to take or to sell to others the oil, condensate and other liquid hydrocarbons recovered by Seller in its separators or traps located at or near the wellhead, and Buyer shall deliver to Seller, as Seller may direct, all liquid hydrocarbons recovered by Buyer at the field compression facilities from the oil
[fol. 109] well gas purchased under this Section 8.

SECTION 9. Buyer shall notify Seller (or such representative as Seller may from time to time designate in writing) in writing or by telegram or orally in person or by telephone or radio, prior to the commencement of delivery of gas hereunder of the rate at which Buyer elects

to take gas, and shall so notify Seller of each change in such rate as far in advance as is practicable. Seller shall fix and change the rate of delivery of gas to conform as closely as practicable with each such notice. Buyer shall, as soon as feasible, notify Seller as to the times and amounts of any differences between the daily quantities which Buyer elected to take and the quantities which Seller delivered.

Article III.

(Seller's Leases and Facilities.)

SECTION 1. Seller shall use due diligence to maintain its leaseholds and its interests therein in the field, except those which in Seller's judgment are of no substantial value; provided, however, that Seller shall not be liable to Buyer if by reason of inadvertence, Seller or the operator in charge of such lease, shall fail to maintain any such leasehold or interest therein.

Seller shall have the right to pool or unitize any of its leases with other leases of Seller and/or others in the Field and to alter or reform any such units at Seller's sole discretion.

[fol. 110] SECTION 2. Seller agrees to operate and maintain its wells and leases in such manner as would a reasonably prudent operator in similar circumstances, so as to deliver gas in accordance with the provisions hereof, provided, however, that Seller shall not be liable to Buyer in damages by reason of Seller's failure to deliver gas hereunder unless gas which may be legally produced is at the time available from the lands, leases and interests therein covered hereby in excess of the quantities of gas required by Seller for its field operations, which are hereby reserved; and provided, further, that Seller shall not be obligated to maintain or operate any well when in Seller's judgment it would be uneconomical for Seller to do so, or to operate any well so as to produce a quantity of gas in excess of the quantity which said well can produce under good operating practices and applicable governmental regulations.

SECTION 3. Seller shall maintain and operate at each of its wells, when necessary in order to deliver gas of the quality specified in Article IX hereof, a standard gas-oil separator, or other equipment at least as efficient, to separate the liquid hydrocarbons and other fluids and foreign matter from the gas delivered hereunder. Seller shall operate such separators in such manner as to separate, recover or extract oil, condensate, and other liquid hydrocarbons and fluids from the gas; and all such products so separated, extracted and recovered by Seller shall be and remain the property of Seller.

SECTION 4. Seller and Buyer agree to cooperate in the making of nominations for well allowables sufficient to cover the daily quantities of gas which, from time to [fol. 111] time, Buyer may elect and has the right to take hereunder; provided, that Seller shall never be required to produce its wells in a manner that, in Seller's opinion, will constitute waste or will injure such well or wells or the reservoir, or to produce such wells at rates in excess of those permitted by applicable rules, regulations or orders of governmental authority.

SECTION 5. Seller agrees, at Buyer's request and from time to time, to keep Buyer informed of all available information with respect to Seller's development and production operations in said Field to the extent that such information is relevant to a determination of Buyer's and Seller's obligations hereunder.

SECTION 6. If, in Seller's judgment, the amount payable hereunder for gas delivered from any of Seller's wells shall be less than Seller's cost of operating such well or wells and its facilities necessary to deliver gas hereunder from such well or wells, Seller may on six months notice cancel and terminate this agreement as to any such well or wells.

SECTION 7. Seller reserves the right and option to extract, or to cause to be extracted, in a plant located in or near the Field, the liquid hydrocarbons contained in the gas, subject to this agreement, in addition to those which may be recovered by the separators installed by Seller

in accordance with the provisions hereof. All liquid hydrocarbons so extracted shall belong to Seller. In the event that Seller exercises such option, the point of delivery of gas hereunder shall, in lieu of the several points of de- [fol. 112] livery provided for elsewhere herein, be a point of connection between the facilities of the plant in which Seller is extracting or causing to be extracted such liquid hydrocarbons and the facilities of Buyer located at or near the tail gate of said plant. In such event also, if there is any gathering tax imposed upon Seller by virtue of Seller's exercise of such option, it is agreed that Buyer will reimburse Seller for three-fourths of the amount of such tax.

Article IV.

(Buyer's Facilities.)

SECTION 1. Buyer agrees to maintain in good condition and to operate its existing gathering lines, compressors, meters and other facilities and to construct, maintain and operate any additional facilities necessary for the taking of gas hereunder.

SECTION 2. Seller, to the extent it may lawfully do so, hereby grants to Buyer (a) appropriate rights on Seller's lands and leaseholds for the construction, operation, maintenance, repair and removal of Buyer's pipelines and other facilities, together with rights of ingress and egress, and (b) the right to construct, operate, maintain, repair and remove measuring and receiving facilities on Seller's lands or leases subject hereto.

Article V.

(Measuring and Testing.)

SECTION 1. MEASURING EQUIPMENT: At each point of delivery, Buyer shall provide an orifice meter [fol. 113] of standard type, constructed and installed in accordance with the applicable specifications (for installations with either flange taps or pipe taps as Buyer determines to be appropriate) contained in Report No. 3 of the Gas Measurement Committee of the American Gas

Association, published April 1955, reprinted with revisions January 1956 (hereinafter called "Report No. 3"), suitable for the measurement of gas in accordance with Report No. 3. Buyer shall install such other instruments and equipment as are necessary to provide information for the measurement of gas and computation of volumes of gas.

SECTION 2. INSPECTIONS AND TESTS: Buyer shall read the meters and charge the charts daily or at such other intervals as may be mutually agreed upon. Upon request of Seller, Buyer will submit to Seller for checking and calculation, the records and charts from Buyer's metering equipment, together with Buyer's calculations based thereon. Such records, charts and calculations shall be returned to Buyer within 15 days after receipt thereof by Seller, after which the same shall be kept on file for the mutual use of both parties for a period of three years.

Seller may, at its option and expense, install and operate meters, instruments and equipment of standard type to check Buyer's meters and equipment, but the measurement of gas for the purposes hereof shall be by Buyer's meters only, except as hereinafter specifically provided to the contrary.

At least once each 35 days, on the date as near the first of each month as practicable, Buyer shall calibrate its meters and recording instruments and Seller, if it has [fol. 114] installed check meters or other recording instruments, shall at the same time calibrate its meters and instruments. Each party shall give notice to the other of the time of all tests of metering equipment so that the other party may conveniently (but at its expense) have its representative present thereat. The cost of regular tests shall be borne by the party who owns the meter.

The meters, instruments and equipment installed by either party shall be subject to inspection by the other at all reasonable times, and either party may request that a special test be made of the other's meters or instruments. If the percentage of inaccuracy of the equipment in question shall be found to be less than 2%, then the cost of such special test shall be borne by the party requesting the test.

If upon any test a meter is found to be inaccurate, it shall be restored to accuracy. If the percentage of inaccuracy of any metering equipment is found to be in excess of 2%, previous readings of such equipment shall be corrected for any period which is definitely known or agreed upon, but in case such period is not so known or agreed upon, such correction shall be made for a period covering the last half of the period since the last test, but in no event for a period exceeding 15 days.

Any error resulting from the calculation of chart records shall be corrected promptly upon detection if either party notifies the other of such error within six months following the expiration of the month in which such error was made.

[fol. 115] If for any reason meters are out of service or out of repair so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the amount of gas delivered during such period shall be estimated and agreed upon by the use of the first of the following methods which is feasible: (a) by using the registration of any check measuring equipment if installed and accurately registering, (b) by correcting the error if the percentage of error is ascertained by calibration, test or mathematical calculation, or (c) by estimating the quantity delivered by reference to actual deliveries during preceding periods under similar conditions when the equipment in question was registering accurately.

Article VI.

(Unit of Volume and Basis of Measurement.)

The unit of volume for all purposes of this agreement shall be 1,000 cubic feet of gas. A "cubic foot of gas" shall be the amount of gas necessary to fill a cubic foot space when the gas is at a temperature of 60° F. and an absolute pressure of 15.025 pounds per square inch.

Volumes shall be computed in accordance with the instructions for computing the flow of gas through orifice meters contained in Report No. 3, using the applicable orifice flow constants, and using the specific gravity method prescribed by paragraph (72) for the determination of

supercompressibility. In the event the viscosity, specific gravity or temperature of the gas are not within the variations provided in paragraph (62) of Report No. 3, the ap- [fol. 116] plicable factor Fr shall be calculated by such method as may be mutually agreed upon.

Volumes shall be corrected for temperature and specific gravity as provided below.

The flowing temperature of the gas shall be determined by means of a recording thermometer of standard manufacture and the arithmetic average of the 24 hour record shall be the temperature at which such gas was delivered during such day. Volumes shall be corrected for each degree of variation in the average temperature from 60° F.

The specific gravity of the gas shall be determined by a recording gravitometer of standard manufacture except that if neither party considers it necessary to install a recording gravitometer, spot tests shall be made with an Edwards type gas balance, or by such other method as shall be mutually agreed upon. If a recording gravitometer is used, the arithmetic average of the 24 hour record shall be the specific gravity of the gas for such day. If the spot test method is used, the specific gravity shall be determined at least once each 35 days on a day as near the first of each month as practicable, or as often as may be found necessary in practice, and the results obtained from each such test shall be the specific gravity of the gas delivered during such month and until the next test is made. Volumes shall be corrected for each 0.001 variation from 1.000.

In determining the volume of gas delivered during a daily period, the orifice chart integrator shall be used in reading the meter chart, except that the inspection method [fol. 117] shall be used if the chart cannot be read with reasonable accuracy by the use of such integrator.

Article VII.

(Delivery Point.)

The point of delivery of gas from each of Seller's wells covered hereby shall be at the wellhead if no separator is installed, or at the outlet side of any separator installed by Seller, in accordance with the provisions of Section 3 of Article III, to separate the liquids from said well.

As between the parties hereto, Seller shall be in the control and possession of gas and responsible for any injury or damage caused thereby until the same shall have been delivered to Buyer, after which delivery Buyer shall be deemed to be in possession and control thereof and responsible for any injury or damage caused thereby. The exact point at which delivery shall be deemed to be made and at which title to such gas shall pass from Seller to Buyer, shall be the flange or weld connecting the facilities of Seller with those of Buyer.

Article VIII.

(Delivery Pressure and Compression.)

All gas delivered by Seller to Buyer hereunder (except gas purchased under the terms of Section 8 of Article II and except such gas as Buyer elects to take at a lesser pressure) shall be delivered at a pressure of not less than [fol. 118] one thousand fifty (1050) psig, so long as the natural flowing pressure of Seller's wells is sufficient to enable Seller to make delivery at such pressure. However, if the natural flowing pressure of any or all of Seller's wells shall be insufficient to permit gas from such wells to enter Buyer's transmission facilities at the pressure at which such facilities shall at the time be operated (not, however, in excess of an initial pressure of one thousand (1,000) psig), or in the event that Seller shall have installed a liquid recovery plant as provided in Section 7 of Article III and shall deliver gas to Buyer at a pressure of less than one thousand (1,000) psig, then in either event Buyer shall install, operate and maintain facilities in said Field to compress gas delivered to it hereunder prior to its introduction into Buyer's facilities.

In the event Buyer has heretofore installed or hereafter installs compression facilities as aforesaid, then Buyer shall operate the same for the compression of gas delivered hereunder from the wells for which such facilities were installed during the remainder of the term of this agreement, and shall provide such additional facilities, if any, as may be necessary in order for Buyer to take gas hereunder; provided, however (except with respect to oil well

gas purchased under Section 8 of Article II), that in the event the natural flowing pressure of any such well will not permit the delivery of gas into the intake or suction side of such field compression facilities at a pressure of at least 500 psig, then Buyer, at its option exercisable on three months written notice to Seller may cancel and terminate this agreement as to any such well.

[fol. 119] The price payable for gas compressed by Buyer as provided above in this Article VIII shall be reduced as provided in Article X, Section 1.

Article IX.

(Quality of Gas.)

Seller agrees that the gas delivered hereunder shall be merchantable gas and will upon delivery—

(a) be commercially free of objectionable substances, including dust, solids, liquids, gums and gum forming constituents;

(b) not contain more than 200 grains of sulphur, or 15 grains of hydrogen sulphide, per Mcf;

(c) have a gross BTU content of not less than 950 per cubic foot.

The sulphur content and hydrogen sulphide content shall be determined by approved standard methods generally in use in the natural gas industry. Buyer shall not be obligated to purchase any gas which does not meet the minimum quality specifications set out herein.

The BTU content shall be determined by joint tests made by taking samples of the gas at the points of delivery and determining the BTU content by means of a standard type recording calorimeter, or by such other method as may be mutually agreed upon. If a recording calorimeter is used, the monthly average of the daily readings obtained [fol. 120] shall be corrected to the basis of measurement provided in Article VI, and corrected from a saturated basis to the moisture content of the gas delivered.

Article X.

(Price, Billing and Payment.)

SECTION 1. (Price) Subject to the further provisions of this Article X, Buyer agrees to pay Seller for each Mcf of gas delivered or for which payment is due hereunder:

(a) during the first five contract years—20c;

(b) during the second five contract years—21c;

(c) during the third five contract years—22c;

(d) during the remaining five contract years—23c.

If Buyer installs and operates compression facilities as provided in Article VIII, the price of all gas so compressed shall be reduced by ½c per Mcf.

SECTION 2. (Billing and Payment) On or before the 20th day of each calendar month Buyer shall deliver to Seller a statement of the quantity of gas delivered during the previous calendar month, the amount Buyer requested and the amount Seller delivered on each day during such month, and the amount of money due, accompanied by payment of the amount due for gas delivered during such previous calendar month.

Should Buyer fail to pay any amount when due, interest thereon shall accrue at the rate of 6% per annum from the date when due until paid. If any such [fol. 121] failure continues for 60 days, Seller may suspend delivery of gas, but the exercise of such right shall be in addition to any other remedy available to Seller.

Each party shall have the right, at reasonable hours to examine the charts, books and records of the other party to the extent necessary to verify the accuracy of any statement, charge, or computation hereunder. If such examination reveals an inaccuracy, the necessary adjustment shall be promptly made.

Article XI.

(Warranty of Title.)

Seller warrants the title to all gas delivered hereunder. Seller further represents and warrants that it will pay

and satisfy, or make provision for the payment and satisfaction of, any and all claims of every nature whatsoever in, to or in respect of gas delivered hereunder; and Seller hereby agrees to indemnify Buyer against all suits, judgments, claims, demands, causes of action, costs, losses and expenses arising out of or in any way connected with any adverse legal claims to the gas delivered hereunder if notified thereof by Buyer.

Buyer assumes no obligation whatever to any royalty owner or to the owner of any other interest of any kind in any gas delivered hereunder, and Seller shall pay all such royalties or other interests upon or in respect of such gas.

[fol. 122] Article XII.

(Force Majeure.)

In the event of either party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that, on such party giving notice and reasonably full particulars of such force majeure in writing or by telephone (followed by written confirmation) or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period; and such cause, except as hereinafter provided, shall as far as possible be remedied with all reasonable dispatch.

The term "force majeure" shall mean acts of God, orders, rules and regulations of governmental authority, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades insurrections, riots, epidemics, landslides, lightning, earthquakes, fires storms floods washouts arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for maintenance of or making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure

of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due [fol. 123] diligence such party is unable to prevent or overcome; such term shall likewise include the inability of either party to acquire, or delays on the part of such party in acquiring at reasonable cost and by the exercise of reasonable diligence, servitudes, rights of way grants, permits, permissions, licenses, materials or supplies which are required to enable such party to fulfill its obligations hereunder.

It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

Notwithstanding the provisions of the first paragraph of this Article XII, above, Buyer shall not be obligated to give notice with respect to an event of force majeure caused by the breakdown or failure to operate of Buyer's field compressors, but Buyer shall remedy such failure as soon as practicable.

Article XIII.

(Arbitration.)

If any controversy arises between the parties with respect to Seller's deliverability under Section 5 of Article II hereof, such controversy (only those elements which are in dispute) shall be submitted to and determined by a board of three arbitrators.

[fol. 124] Either party may notify the other in writing of its desire to have arbitration and of the name of the arbitrator selected by the party giving such notice. Within 20 days after receipt of such notice, the party receiving the same shall select the second arbitrator and notify the party giving notice of the name of such second arbitrator. If the party receiving such notice shall fail to

name a second arbitrator, the party giving such notice shall name a second arbitrator. If the two arbitrators so named shall fail within 20 days after the appointment of the second arbitrator to agree upon and select a third arbitrator, then upon written application by either party the third arbitrator shall be appointed by the person who is then Chief Judge of the United States Court of Appeals for the Fifth Circuit.

The three arbitrators shall be reputable independent consulting geologists or petroleum engineers. No person so selected or appointed as an arbitrator shall be in the regular salaried employ of either of the parties or of any affiliate of either such party.

The arbitrators shall fix a reasonable time and place for hearings, at which each party may submit such evidence as it may see fit, and the parties hereby expressly waive the rules of evidence which would apply in cases at law or in equity and agree that the arbitrators may establish their own rules of procedure and evidence. The decision of the arbitrators shall be made within 30 days, or such longer period as may be required in unusual circumstances, after the conclusion of any hearing. The decision of the arbitrators shall be in writing, signed by the arbitrators [fol. 125] or a majority of them, and shall be final and binding upon the parties.

The arbitrators shall be vested with all powers conferred by the laws of the State in which the field is located. If final arbitration is not accomplished as aforesaid, then this agreement for the submission to arbitration shall be enforced by appropriate proceedings under such law as may be applicable.

In their decision, arbitrators shall be guided by the provisions of this agreement applicable to the settlement and determination of the matter to be arbitrated.

Each party shall pay the cost and expenses of the arbitrator provided to be selected by it and of counsel, witnesses and others acting for it. All other costs of arbitration shall be divided equally between the parties.

This arbitration clause shall apply only when the deliverability of Seller's wells shall be questioned during intervals between official deliverability tests made as pro-

vided elsewhere herein; and it is not the purpose of this Article to permit either party to question the accuracy of such a test at the time it is made pursuant to the requirements of the Mississippi Oil and Gas Board.

Article XIV.

(Taxes.)

The term "taxes" as used herein shall mean any tax (other than ad valorem, income, or excess profits taxes), [fol. 126] license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right, or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "Tax" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

Seller agrees to pay or cause to be paid all taxes and assessments imposed upon Seller with respect to the gas delivered hereunder prior to its delivery to Buyer. Buyer agrees to pay or cause to be paid all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by Buyer. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this contract.

All taxes in effect on the date of execution hereof, up to the respective effective rates thereof on said date, imposed on Seller with respect to the gas delivered hereunder, shall not be considered as "new, additional or increased taxes" under the following provisions of this Article.

In the event that any new, additional or increased taxes are hereafter lawfully imposed upon and paid by Seller with respect to the gas delivered hereunder, Buyer agrees to reimburse Seller for three-fourths (¾) of the amount [fol. 127] of any such new, additional or increased taxes so

paid by Seller or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied.

Article XV.

(Effective Date and Term.)

Subject to the other provisions hereof, this agreement shall be and remain in full force and effect for a term of twenty (20) years from and after September 3, 1957.

Seller agrees to take all necessary steps to obtain the necessary authority from the Federal Power Commission, in form acceptable to Seller, to commence deliveries to Buyer on September 3, 1957, under the terms of this agreement.

Article XVI.

(Governmental Regulation.)

Subject to the provisions of Article XV, this agreement shall be subject to all valid orders, rules and regulations of any regulatory authority having jurisdiction and shall be construed in accordance with the laws of the State of Mississippi.

[fol. 128]

Article XVII.

(Assignability.)

This agreement, and all of the stipulations, terms and conditions thereof, shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, and shall be binding upon any purchaser of the lands, leases, interests therein, or gas at any time covered hereby, and Seller agrees, on behalf of itself and its successors and assigns, that the obligations herein imposed upon Seller shall extend to and run with said lands and leases (except such thereof as may have been released from this agreement), and shall be construed to be and to have the force and effect of a real obligation and covenant, easement and servitude running with the land and leases and property at any time covered thereby; no

sale or transfer of Seller's lands, leases, or interests therein shall be made unless the assignment and transfer shall provide that the purchaser or transferee shall be bound by all the terms and provisions of this agreement, insofar as the same shall affect or relate to the property or interest sold or transferred.

No such sale, sublease or transfer shall be binding upon Buyer unless and until an executed copy of the instrument effecting said sale or transfer is furnished Buyer.

[fol. 129] Article XVIII.

(Miscellaneous.)

(a) No waiver by Buyer or Seller of any default of the other hereunder shall operate as a waiver of any subsequent default whether of a like or different character.

(b) All notices hereunder, except those specifically provided for under other provisions hereof, shall be deemed duly given if in writing and sent by postpaid registered or certified mail addressed to the respective parties at the addresses stated below or such other addresses as they shall respectively hereafter designate in writing from time to time:

Seller:

Sun Oil Company,
Rio Grand National Building,
Dallas 21, Texas.

Buyer:

Southern Natural Gas Company,
P. O. Box 2563,
Birmingham 2, Alabama.

[fol. 130] In Witness Whereof, this agreement has been executed in four originals as of the date first above writ-

ten by Seller and by Buyer, by their respective officers thereunto duly authorized. [JEP, JMS]

SUN OIL COMPANY,

By J. E. PRENDERGAST, [GBB, JEP],
Agent and Attorney in Fact.

SOUTHERN NATURAL GAS COMPANY,

By JOHN M. STARKE,
(John M. Starke),
Vice President.

Attest:

J. S. CONLON,
Asst. Secretary.

State of Texas,
County of Dallas. ss.

Before the undersigned officer in and for said State and County duly authorized to administer oaths and to take acknowledgments to deeds, personally came and appeared J. E. Prendergast, Agent and Attorney in Fact of Sun Oil Company, a corporation of the State of New Jersey, who acknowledged to and before me that for and on behalf of said corporation he signed, executed and delivered the foregoing instrument as of the date therein written as the act and deed of said corporation, he being by said corporation duly authorized to do so.

Given under my hand and seal of office this 31st day of July, A. D. 1957.

KATHERINE LOVETT,
(Katherine Lovett),
Notary Public.

[fol. 131] State of Texas,
County of Harris. ss.

Before the undersigned officer in and for said State and County duly authorized to administer oaths and to take acknowledgments to deeds, personally came and ap-

peared John M. Starke, a Vice President of Southern Natural Gas Company, a corporation of the State of Delaware, who acknowledged to and before me that for and on behalf of said corporation he signed, executed and delivered the foregoing instrument as of the date therein written as the act and deed of said corporation, he being by said corporation duly authorized to do so.

Given under my hand and seal of office this the 31st day of July, A. D. 1957.

MARY L. SHORT,
(Mary L. Short),
Notary Public.

EXHIBIT "A" TO GAS RATE SCHEDULE No. 87

Agreement between Sun Oil Company and Southern Natural Gas Company Production Units in Gwinville Field, Jefferson Davis County, Mississippi

Recorded in Records of
Jefferson Davis County,
Mississippi

Gwinville Gas Unit No.	Date of Declaration of Unit	Book	Page No.	Sun Oil Company's Interest
1	12-23-47	26	214	.008789
2	12-23-47	26	215	.015625
3	12-23-47	26	217	.022367

[fol. 132]

Recorded in Records of
Jefferson Davis County,
Mississippi

Gwinville Gas Unit No.	Date of Declaration of Unit	Book	Page No.	Sun Oil Company's Interest
4	1-16-48	26	308	.242188
5	12-23-47	26	218	.254883
6	12- 4-47	27	417	.129766
7	3-17-48	31	94	.440625
8	12-23-47	26	220	.156250
11	6-16-48	29	262	.318301
12	12-23-47	26	222	.355470
13	3-15-48	29	78	.394731
15	1-20-48	27	39	.250570
18	1-16-48	26	311	.687500
19	1-16-48	26	313	.062500
20	9-25-47	26	223	.375000
21	3- 1-48	29	421	.159516
22	12- 4-47	27	416	.130039
41	1- 3-50	37	298	.021750
42	2-10-48	28	153	.5033095
47	9- 9-48	31	147	.406250
53	3-13-50	38	75	094840

[fol. 133]

BEFORE THE FEDERAL POWER COMMISSION

Received Oct. 10, 4 05 PM '57.

FPC GAS RATE.
Schedule No. 87.
Supplement No. 1.

Filing Date: 10-10-57.
Effective Date: Suspended.

Sun Oil Company
Southwest Division
Rio Grande National Building
P. O. Box 2880
Dallas 21, Texas
Natural Gas Department

S. M. Gladney
Manager
T. F. Hill
Assistant Manager

October 9, 1957

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Re: Sun Oil Company (Southwest Division) F. P. C.
Gas Rate Schedule No. 55.

Dear Sir:

By letter order dated September 12, 1957, the Commission, acting through its Acting Secretary, purported to reject Sun Oil Company's application for a certificate of public convenience and necessity filed with the Commission on August 13, 1957, in Docket No. G-13059 and [fol. 134] also purported to reject Sun Oil Company's related gas rate schedule which was likewise filed with the Commission on August 13, 1957. These filings by Sun Oil Company are applicable to its sale of gas to Southern Natural Gas Company under a contract dated August 1,

1957, covering certain properties in the Gwinville Field, Jefferson Davis County, Mississippi.

The Commission erred in said letter order of September 12, 1957, and Sun Oil Company is seriously aggrieved thereby and is filing with the Commission simultaneously herewith an Application for Rehearing of said letter order. However, in order that Sun Oil Company may not be further penalized by the erroneous order of the Commission, Sun Oil Company herewith submits said contract of August 1, 1957, together with other documents, in accordance with Section 154.94 of the Commission's Regulations, as a change in its F. P. C. Gas Rate Schedule No. 55.

There are submitted herewith in accordance with Section 154.94 of the Commission's Regulations the contract of August 1, 1957, a comparative statement of sales and revenues for two successive twelve months periods, and a statement in support of the adjustment in price contemplated by the contract of August 1, 1957. This letter and the enclosures are submitted in triplicate.

The adjustment in price contemplated by the contract of August 1, 1957, is to be effective on and after September 3, 1957. It is requested, because of the circumstances which have caused the filing at this time and in this form, that the Commission waive the notice requirements, in accordance with Section 4 (d) of the Natural Gas Act and Section 154.98 of the Commission's Regulations, so that such price [fol. 135] adjustment may become effective on September 3, 1957.

A copy of this letter and copies of the enclosures have been mailed to Southern Natural Gas Company.

With regard to this filing, address communications to: G. B. Bennett, P. O. Box 2880, Dallas, Texas; and H. D. Coe, Suite 1208, 1700 "K" Street, N. W. Washington 6, D. C.

Since we believe that the Commission, under both the Natural Gas Act and its Regulations, is in error in its above mentioned letter order of September 12, 1957, in, among other things, regarding Sun Oil Company's above

mentioned contract with Southern Natural Gas Company as a change in rate schedule, this filing is made under protest and under the compulsion of the letter order of September 12, 1957, and the Commission's Regulations. This filing is made without admitting the validity of said order and without prejudice to the rights of Sun Oil Company to contest the validity of said order. In addition, this filing is made without admitting that the Commission has jurisdiction over either Sun Oil Company or the subject matter of this filing, and without prejudice to the rights of Sun Oil Company to contest the jurisdiction of the Commission over Sun Oil Company and the subject matter of this filing.

Yours very truly,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By G. G. BENNETT,
(G. B. Bennett),
Superintendent Natural Gas Department.

BEFORE THE FEDERAL POWER COMMISSION

Received Oct. 10, 4:05 P.M., '57.

Sun Oil Company
Dallas, Texas

Gwinville Field—Jefferson Davis County, Mississippi
Sales of Southern Natural Gas Company

	(Compressed)			(Non-Compressed)		
Period	MCF Sold 16.7#	Price Per MCF 16.7#	Total Value	MCF Sold 16.7#	Price Per MCF 16.7#	Total Value
Sept., 1956	375,613	.07683726¢	$28,861.07	160,629	.08183726¢	$13,145.44
Oct., 1956	358,878	.07683726¢	27,575.20	135,173	.08183726¢	11,062.19
Nov., 1956	354,646	.07683726¢	27,250.03	133,925	.08183726¢	10,960.06
Dec., 1956	349,628	.07683726¢	26,864.46	151,119	.08183726¢	12,367.16
Jan., 1957	332,174	.07683726¢	25,523.34	162,489	.08183726¢	13,297.65
Feb., 1957	313,714	.07683726¢	24,104.92	144,513	.08183726¢	11,826.55
Mar., 1957	331,490	.07683726¢	25,470.78	134,539	.08183726¢	11,010.30
Apr., 1957	304,069	.07683726¢	23,363.83	95,234	.08183726¢	7,793.69
May, 1957	278,341	.07683726¢	21,386.96	97,395	.08183726¢	7,970.54
June, 1957	274,659	.07683726¢	21,104.04	110,399	.08183726¢	9,034.75
July, 1957	274,368	.07683726¢	21,081.69	129,381	.08183726¢	10,588.19
Aug., 1957	274,368*	.07683726¢	21,081.69	129,381*	.08183726¢	10,588.19

	(Compressed)			(Non-Compressed)		
Period	MCF Sold 15.025 #	Price Per MCF 15.025 #	Total Value	MCF Sold 15.025 #	Price Per MCF 15.025 #	Total Value
Sept., 1957	375,613*	19.5¢	$73,244.54	160,629*	20.0¢	$32,125.80
Oct., 1957	358,878*	19.5¢	69,981.21	135,173*	20.0¢	27,034.60
Nov., 1957	354,646*	19.5¢	69,155.97	133,925*	20.0¢	26,785.00
Dec., 1957	349,628*	19.5¢	68,177.46	151,119*	20.0¢	30,223.80
Jan., 1958	332,174*	19.5¢	64,773.93	162,489*	20.0¢	32,497.80
Feb., 1958	313,714*	19.5¢	61,174.23	144,513*	20.0¢	28,902.60
Mar., 1958	331,490*	19.5¢	64,640.55	134,539*	20.0¢	26,907.80
Apr., 1958	304,069*	19.5¢	59,293.46	95,234*	20.0¢	19,046.80
May, 1958	278,341*	19.5¢	54,276.50	97,395*	20.0¢	19,479.00
June, 1958	274,659*	19.5¢	53,558.51	110,399*	20.0¢	22,079.80
July, 1958	274,368*	19.5¢	53,501.76	129,381*	20.0¢	25,876.20
Aug., 1958	274,368*	19.5¢	53,501.76	129,381*	20.0¢	25,876.20

Period	16.7#	MCF 16.7#	Value	16.7#	MCF 16.7#	Value
Sept., 1956	375,613	.07683726¢	$28,861.07	160,629	.08183726¢	$13,145.44
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Dec., 1956	349,628	.07683726¢	26,864.46	151,119	.08183726¢	12,367.16
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May, 1957	278,341	.07683726¢	21,386.96	97,395	.08183726¢	7,970.54
June, 1957	274,659	.07683726¢	21,104.04	110,399	.08183726¢	9,034.75
July, 1957	274,368	.07683726¢	21,081.69	129,381	.08183726¢	10,588.19
Aug., 1957	274,368*	.07683726¢	21,081.69	129,381*	.08183726¢	10,588.19

	(Compressed)			(Non-Compressed)		
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Dec., 1957	349,628*	19.5¢	68,177.46	151,119*	20.0¢	30,223.80
Jan., 1958	332,174*	19.5¢	64,773.93	162,489*	20.0¢	32,497.80
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June, 1958	274,659*	19.5¢	53,558.51	110,399*	20.0¢	22,079.80
July, 1958	274,368*	19.5¢	53,501.76	129,381*	20.0¢	25,876.20
Aug., 1958	274,368*	19.5¢	53,501.76	129,381*	20.0¢	25,876.20

* Estimated

Note: Prices for 12 month period preceding September 1, 1957 include tax reimbursement for increased taxes prior to September 1, 1957.

[fol. 137]

BEFORE THE FEDERAL POWER COMMISSION

Sun Oil Company

F. P. C. Gas Rate Schedule No. 55.

STATEMENT OF REASONS, NATURE AND BASIS FOR PRICE ADJUSTMENT.

Under the provisions of the contract of August 1, 1957, between Sun Oil Company, as Seller, and Southern Natural Gas Company, as Buyer, covering certain properties in the Gwinville Field, Jefferson Davis County, Mississippi, the price to be paid to Sun Oil Company for gas delivered from such properties, on and after September 3, 1957, is 20c per Mcf of gas not requiring compression and 19.5c per Mcf of gas requiring compression. Such prices are to be applied to volumes calculated at a pressure base of 15.025 p.s.i.a.

The provisions of the contract by which the above stipulated prices are determined were arrived at by bargaining at arm's length between the parties and constitute an integral part of the consideration upon which such contract is based. The contract between the parties of August 26, 1947, comprising Sun Oil Company's F. P. C. Gas Rate Schedule No. 55 has expired by its own terms. The initial prices set out in the contract of August 1, 1957, are clearly just and reasonable, particularly in view of the long term of the contract and the nature and location of the gas reserves and properties involved.

The prices set out in the contract as being effective on and after September 3, 1957, do not exceed the market price, market value, or commodity value of gas in the area in [fol. 138] which the properties covered by the contract are situated.

Address All Communications
To The Secretary

BEFORE THE FEDERAL POWER COMMISSION

Federal Power Commission
Washington 25

Mar. 23, 1955

W. E. Warren
P. O. Box 2880
Dallas, Texas

Gentlemen:

This is to advise you that the rate filings listed at the bottom of this letter have been accepted for filing.

In the event that any of the documents comprising the listed rate schedules contain provisions for future automatic adjustments in rates and charges based upon new or increased taxes, prices paid for gas by or to others, price re-determination provisions, or any similar provision, your attention is directed to the fact that such provisions, when invoked to change the rates being charged June 7, 1954, will constitute a change in such rates and charges within the meaning of Section 4(d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under such Act as promulgated by this Commission's order No. 174-B. The Act and the Commission's rules require that such changes be filed with the Commission not more than 90 days nor less than 30 days prior to the proposed effective date thereof.

[fol. 139] This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings of orders which have been or may hereafter be made by the Commission

in any proceeding now pending or hereafter instituted by or against your company.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Rate Schedule Designation
Sun Oil Co.
F.P.C.

Description of Document	Date of Letter of Transmittal	Gas Rate Schedule No.	Supplement No.
Contract 8/31/44	9/16/54	52	—
Supp. Agree. 4/3/46	9/16/54	52	1
Supp. Agree. 12/31/48	9/16/54	52	2
Supp. Agree. 8/23/52	9/16/54	52	3
Contract 12/1/51	9/24/51	53	—
Supp. Agree. 12/1/51	9/24/51	53	1
Supp. Agree. 3/20/52	9/24/54	53	2
Letter 6/5/52	9/24/54	53	3
Contract 5/28/47	9/16/54	54	—
Letter 10/19/50	9/16/54	54	1
Letter 11/3/53	9/16/54	54	2
Letter 12/14/53	9/16/54	54	3
Letter 1/8/54	9/16/54	54	4
[fol. 140]			
Contract 8/26/47	9/16/54	55	—
Letter 9/10/53	9/16/54	55	1
Contract 12/13/51	11/22/54	57	—
Letter 1/17/52	11/22/54	57	1
Letter 1/18/52	11/22/54	57	2
Letter 9/16/52	11/22/54	57	3
Contract 9/15/49	9/16/54	58	—
Letter 2/5/51	9/16/54	58	1
Supp. Agree. 7/30/51	9/16/54	58	2
Letter 10/2/51	9/16/54	58	3
Letter 1/15/53	9/16/54	58	4
Letter 3/18/54	9/16/54	58	5
Letter 5/10/54	9/16/54	58	6
Letter 7/26/54	9/16/54	58	7

Rate Schedule Designation
Sun Oil Co.
F.P.C.

Description of Document	Date of Letter of Transmittal	Gas Rate Schedule No.	Supplement No.
Contract 6/23/49	9/16/54	59	—
Letter 6/28/52	9/16/54	59	1
Letter 5/6/54	9/16/54	59	2
Contract 2/26/54	9/16/54	60	—
Supp. Agree. 5/21/54	9/16/54	60	1
Contract 9/15/49	9/16/54	61	—
Supp. Agree. 7/30/51	9/16/54	61	1
Letter 1/15/53	9/16/54	61	2
Contract 5/7/51	9/16/54	62	—
Supp. Agree. 12/14/49	9/16/54	62	1
Contract 11/1/45	11/22/54	63	—
Letter 11/1/45	11/22/54	63	1
Letter 11/1/45	11/22/54	63	2
Letter 1/26/50	11/22/54	63	3
Supp. Agree. 6/29/50	11/22/54	63	4
Letter 6/29/50	11/22/54	63	5
[fol. 141]			
Contract 11/13/53	11/22/54	64	—
Assignment 2/12/54	11/22/54	64	1
Letter 5/19/54	11/22/54	64	2

Address All Communications
To The Secretary

BEFORE THE FEDERAL POWER COMMISSION

100-2 Gas Cor.
Federal Power Commission
Washington 25

Jun. 6, 1955

Sun Oil Company
Rio Grande National Building
Dallas 2, Texas

Gentlemen:

This is to advise you that the rate filings listed at the bottom of this letter have been accepted for filing, that

notice is hereby waived to permit such rate schedule to be effective as of the date of filing or such later date as requested, as shown below.

In the event that any of the documents comprising the listed rate schedules contain provisions for future automatic adjustments in rates and charges based upon new or increased taxes, prices paid for gas by or to others, price re-determination provisions, or any similar provisions, your attention is directed to the fact that such provisions, when invoked to change the effective rates and [fol. 142] charges, will constitute a change in such rates and charges within the meaning of Section 4(d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under such Act as promulgated by this Commission's Order No. 174-B. The Act and the Commission's rules require that such changes be filed with the Commission not more than 90 nor less than 30 days prior to the proposed effective date thereof.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

By direction of the Commission.

Secretary.

Rate Schedule Designation
Sun Oil Company

Description of Document—Notice of Change of 4/22/55. Tax Increase.

Date of Letter of Transmittal—4/22/55.

F.P.C. Gas Rate Schedule No.—55.
Supplement No.—2.
Effective Date—4/28/55.

RJM:dk
5/31/55

[fol. 143]

BEFORE THE FEDERAL POWER COMMISSION

Received Jul. 5, 3 52 PM '55.

100-2 Gas Cor.
Sun Oil Company
Southwest Division
Rio Grande National Building
Dallas 2, Texas

S. M. Gladney
Manager

T. F. Hill
Assistant Manager

June 28, 1955

Mr. Leon M. Fuquay, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

By letter dated April 22, 1955, accepted for filing and made effective on April 28, 1955, Sun Oil Company (Southwest Division) filed a change in the charges contained in the contract between Sun Oil Company and Southern Natural Gas Company, dated August 26, 1947, as therein provided for, such increase in charges being required because of the increase in the gas severance tax levied by the State of Mississippi, effective as of April 1, 1955.

It appears that in the preparation of said change in charges the new severance tax applicable to the gas covered by this rate schedule was miscalculated, with the result

that the revised rates effective under the contract as set out in said filing were incorrectly stated, the variance being of a minor nature.

[fol. 144] Accordingly, it is requested that the statement in support of the increased charges attached to said filing dated April 22, 1955, be modified so as to reflect revised charges of 8.1857c per m.c.f. for non-compressed gas (in lieu of the revised charge of 8.183726c per m.c.f. therein stated) and 7.6744c per m.c.f. for compressed gas (in lieu of the revised charge of 7.683726c per m.c.f. therein stated), measured at a pressure base of 16.7 p.s.i.a. It is also requested that the attached comparative statement based on such corrected revised charges be substituted for the comparative statement attached to said filing dated April 22, 1955.

A copy of this letter and enclosure have been mailed to the purchaser.

With regard to this filing, address communications to: B. E. Warren, P. O. Box 2880, Dallas, Texas.

This filing is made under compulsion of the Commission's Order No. 174-B without admitting the validity of such order and without admitting that the Federal Power Commission has jurisdiction over either Sun Oil Company or the subject matter of this filing, and without prejudice to the rights of Sun Oil Company to contest the validity of said order, and without prejudice to its right to contest the jurisdiction of the Commission over the subject matter of this filing.

Yours very truly,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By B. E. WARREN,
(B. E. Warren),
Superintendent, Natural Gas Department.

File No Reply Required (Illegible) (Initials).

[fol. 145]

BEFORE THE FEDERAL POWER COMMISSION

FINDINGS AND ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.

(Issued May 28, 1956.)

Docketed May 28, 1956.

100-2 Formal.
United States of America.
Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby, Frederick Stueck and William R. Connole.

In the Matters of:

Howard W. Fleet, et al.
Docket No. G-3275.

M. F. Powers.
Docket Nos. G-4814 thru G-4819, incl.

John A. Barnett.
Docket No. G-5191.

Big Chief Drilling Company.
Docket Nos. G-5218, G-5200 and G-5221.

Havenstrite Oil Company of Texas.
Docket Nos. G-5291 and G-5292.

Shell Oil Company.
Docket No. G-5659.

Baker and Taylor Drilling Company.
Docket No. G-5993.

Amerada Petroleum Corporation.
Docket Nos. G-6319, G-6321 thru G-6324, incl.

[fol. 146] Kerr-McGee Oil Industries, Inc.
Docket No. G-6378.

Joseph I. O'Neil, Jr.
Docket No. G-6393.

Southwestern Exploration Company (a Co-partnership).
Docket Nos. G-6406 and G-6407.

Bass & Vessels, et al.
Docket No. G-6429.

Phillips Drilling Corporation.
Docket No. G-6608.

Sun Oil Company.
Docket Nos. G-6619, G-6620, G-6626 thru G-6640, incl., G-6642 thru G-6656, incl., G-6658 thru G-6664 incl. and G-6670.

Cabot Carbon Company.
Docket No. G-6825.

Hanco Oil and Gas Company, Ltd.
Docket No. G-6950.

Sue Reeder Turner.
Docket No. G-6994.

Gulf Oil Corporation.
Docket Nos. G-7136 thru G-7141, incl., G-7143 thru G-7145, incl., G-7147 thru G-7158, incl.

[fol. 147] Fraley Gas Company.
Docket No. G-7706.

N. B. Hunt.
Docket No. G-7734.

Wiley Page.
Docket No. G-7738.

W. W. Lechner and R. E. Hubbard.
Docket No. G-7755.

G. B. Cree and H. E. Schwartz.
Docket No. G-7761.

H. E. Schwartz, G. B. Cree and Southern Production Company, Inc.
Docket No. G-7762.

Harold Davidor and R. H. Davidor, d.b.a. Davidor & Davidor.
Docket No. G-7768.

Late Oil Company.
Docket Nos. G-7769 and G-7770.

Orville H. Parker, et al.
Docket No. G-7811.

Phil D. Phillips, et al.
Docket No. G-7812.

Clayton A. Woofter, et al. Lease, Roy G. Hildreth, et al., and Roy G. Hildreth, Agent.
Docket No. G-7813.

[fol. 148] H. C. Grady, Jr., and J. R. Graham, Jr.
Docket No. G-7815.

J. D. Caruthers.
Docket Nos. G-7816 and G-7821.

Lisbon Exploration Company, Inc.
Docket No. G-7822.

Malco Refineries, Inc.
Docket No. G-7823.

Cree Oil, H. E. Schwartz and D. E. Williams.
Docket No. G-7824.

H. W. Klein.
Docket No. G-7825.

Charles N. Compton Oil and Gas Co.
Docket No. G-7839.

Seward Butch Martin Oil and Gas Co.
Docket No. G-7840.

Blanton Oil and Gas Co.
Docket No. G-7841.

H. C. Hall Oil and Gas Co.
Docket No. G-7842.

Little Rough Oil and Gas Co.
Docket No. G-7843.

Ben Compton Oil and Gas Co.
Docket No. G-7844.

[fol. 149] Louis C. Quin, H. R. Wofford, Jr., and Arthur F. Graf, Jr.
Docket No. G-7851.

Goliad Corporation.
Docket No. G-7852.

Peerless Oil and Gas Company.
Docket No. G-8083.

Each of the above Applicants has filed an application for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, authorizing Applicants to render services as hereinafter described, subject to the jurisdiction of the Commission, all as more fully represented in their respective applications which are on file with the Commission and open for public inspection.

Applicants produce and sell natural gas for transportation in interstate commerce for resale, as indicated below. Applicants are hereinafter referred to as Applicant.

[fol. 150]

Docket No. G—Location of Field—Buyer.

3275—Denton Gasoline Plant—El Paso Natural Gas Company.

4814 thru 4817, incl., and 4819—Hugoton Field, Kearney County, Kansas—Colorado Interstate Gas Company; Cities Service Gas Company; Kansas-Nebraska Natural Gas Company.

4818—Carthage Field, Panola County, Texas—Texas Gas Transmission Corporation.

5191—Spraberry Trend Area, Midland and Glasscock Counties, Texas—Texas Gas Products Corporation.

5218, 5220, and 5221—Chris Hunt, Hitch Gray and Stanolind-Wiggins Leases in Keyes Field, Cimarron County, Oklahoma—Colorado Interstate Gas Company.

5291 and 5292—Anna Wells and Pembrook Leases in Upton County, Texas—Texas Gas Products Corporation.

Docket No. G—Location of Field—Buyer.

5639—Tubb-Blinberry Field, Lea County, New Mexico—El Paso Natural Gas Company.

6993—Acreage in Lea County, New Mexico—El Paso Natural Gas Company.

6319—Ignacio Field, La Plata County, Colorado—El Paso Natural Gas Company.

6321, 6323 and 6324—Langlie-Mattix Field, Lea County, New Mexico—El Paso Natural Gas Company.

6322—Fields in Lea County, New Mexico—El Paso Natural Gas Company.

6378—Keyes Field, Cimarron County, Oklahoma—Colorado Interstate Gas Company.

6393—Jack Herbert Field, Upton County, Texas—El Paso Natural Gas Company.

6406—Hugoton Field, Haskell, Stanton and Seward Counties, Kansas—Colorado Interstate Gas Company; Northern Natural Gas Company.

[fol. 151]

6407—Greenwood Field, Baca County, Colorado, and Morton County, Kansas—Colorado Interstate Gas Company.

6429—North Sun Field, Starr County, Texas—Tennessee Gas Transmission Company.

6608—Allison Unit Area, San Juan County, New Mexico, and La Plata and Archuleta Counties, Colorado—El Paso Natural Gas Company.

6619—Levelland Field, Hockley County, Texas—El Paso Natural Gas Company.

6620, 6640, 6643, 6645, 6648, 6653, 6655 and 6662—Carthage Field, Panola County, Texas—Texas Gas Transmission Corporation; United Gas Pipe Line Company; Texas Eastern Transmission Corporation; Tennessee Gas Transmission Company; Southern Natural Gas Company.

6626—Mission Valley Field, Victoria County, Texas—Transcontinental Gas Pipe Line Corporation.

Docket No. G—Location of Field—Buyer.

6627—Shield Field, Nueces County, Texas—Transcontinental Gas Pipe Line Corporation.

6628—La Gloria Field, Jim Wells County, Texas—Transcontinental Gas Pipe Line Corporation.

6629—Various Fields in Starr County, Texas—Transcontinental Gas Pipe Line Corporation.

6630—Quinto Creek Field, Jim Wells County, Texas—Transcontinental Gas Pipe Line Corporation.

6631—N. Government Wells Field, Duval County, Texas—Tennessee Gas Transmission Company.

6632—Brayton Field, Nueces County, Texas—Tennessee Gas Transmission Company.

6633—Gyp Hill Field, Brooks County, Texas—Tennessee Gas Transmission Company.

6634—Placedo Field, Victoria County, Texas—Tennessee Gas Transmission Company.

[fol. 152]

6635—Chesterville Field, Colorado County, Texas—Tennessee Gas Transmission Company.

6636—Seeligson Field, Jim Wells County, Texas—Tennessee Gas Transmission Company.

6637—Edinburg Field, Hidalgo County, Texas—Tennessee Gas Transmission Company.

6638—Red Fish Bay Field, Nueces County, Texas—United Gas Pipe Line Company.

6639 and 6642—Cabeza Creek Field, Goliad County, Texas—United Gas Pipe Line Company.

6644—Hordes Creek Field, Goliad County, Texas—United Gas Pipe Line Company.

6646—N. Minoak Field, Bee County, Texas—Texas Eastern Transmission Corporation.

6647—Corpus Christi Channel Field, Nueces County, Texas—Tennessee Gas Transmission Company.

Docket No. G—Location of Field—Buyer.

6649—Payton-Devonian Field, Pecos County, Texas—El Paso Natural Gas Company.

6650—Richard King Field, Nueces County, Texas—Tennessee Gas Transmission Company.

6651—Helen Gohlke Field, Victoria County, Texas—Texas Eastern Transmission Corporation.

6652—Heyser Field, Victoria County, Texas—Tennessee Gas Transmission Company.

6654 and 6664—Delhi Field, Richland Parish, Louisiana—Texas Eastern Transmission Corporation.

6656 and 6660—Jalco Field, Lea County, New Mexico—El Paso Natural Gas Company.

6658—Gwinville Field, Jefferson Davis County, Mississippi—Southern Natural Gas Company.

6659—Langmat Field, Lea County, New Mexico—El Paso Natural Gas Company.

6661—Burnell-North Pettus Field, Karnes County, Texas—United Gas Pipe Line Company.

[fol. 153]

6663—Eumont Field, Lea County, New Mexico—Permian Basin Pipe Line Company.

6670—North Bay City and North Markham Fields, Matagorda County, Texas—Transcontinental Gas Pipe Line Corporation.

6825—Keyes Field, Texas County, Oklahoma—Colorado Interstate Gas Company.

6950—San Juan Basin, Rio Arriba County, New Mexico—El Paso Natural Gas Company.

6994—Acreage in San Juan County, New Mexico—El Paso Natural Gas Company.

7136—Winnsboro Field, Wood County, Texas—Lone Star Gas Company.

7137—Woodlawn Field, Harrison County, Texas—Mississippi River Fuel Corporation.

Docket No. G—Location of Field—Buyer.

7138—Waskom Field, Harrison and Panola Counties, Texas —Arkansas-Louisiana Gas Company.

7139—Lemonville and West Gist Fields, Newton and Jasper Counties, Texas—Texas Eastern Transmission Corporation.

7140—New Ulm Field, Austin County, Texas—Tennessee Gas Transmission Company.

7141—North Lansing Field, Harrison County, Texas—Arkansas-Louisiana Gas Company.

7143—Heyser Field Calhoun County, Texas—Tennessee Gas Transmission Company.

7144—Mustang Island Field, Nueces County, Texas—United Gas Pipe Line Company.

7145—Placedo Field, Victoria County, Texas—Tennessee Gas Transmission Company.

7147—N. McFaddin Field, Victoria County, Texas—United Gas Pipe Line Company.

7148—Harleton (Whelan) Field, Harrison County, Texas —H. L. Hunt.

[fol. 154]

7149—Stowell Field, Chambers County, Texas—Texas Gas Corporation.

7150—Keystone, Waddell and McKee Fields, Winkler County, Texas—El Paso Natural Gas Company.

7151—Jalmat and Blinberry Fields, Lea County, New Mexico—El Paso Natural Gas Company.

7152—Carson Field, Gray County, Texas—Phillips Petroleum Company.

7153—Sweetie Peck Field, Midland County, Texas—El Paso Natural Gas Company.

7154—S. Fullerton Field, Andrews County, Texas—El Paso Natural Gas Company.

7155—Denton Field, Lea County, New Mexico—El Paso Natural Gas Company.

Docket No. G—Location of Field—Buyer.

7156—Waddell, Edwards, Sand Hills, University-Waddell, and Dune Fields, Crane County, Texas—El Paso Natural Gas Company.

7157—Jack Herbert (Penn) Field, Upton County, Texas—El Paso Natural Gas Company.

7158—Arrowhead, Blinberry, Brunson, Drinkard, Hair, S. Hair, McCormick, Paddock and Perose-Skelly Fields, Lea County, New Mexico—El Paso Natural Gas Company.

7706—Fields in Wayne County, West Virginia—United Fuel Gas Company.

7734—Fields in Lea County, New Mexico—El Paso Natural Gas Company.

7738—North Lansing Field, Harrison County, Texas—Arkansas-Louisiana Gas Company.

7755—North Lansing Field, Harrison County, Texas—H. L. Hunt.

7761—East Panhandle Field, Gray County, Texas—Phillips Petroleum Company.

[fol. 155]

7762—West Panhandle Field, Gray County, Texas—Cabot Carbon Company.

7768—North Whiterock Field, Noble County, Oklahoma—Cities Service Gas Company.

7769—Langmat Field, Lea County, New Mexico—El Paso Natural Gas Company.

7770—Eumont Field, Lea County, New Mexico—El Paso Natural Gas Company; Phillips Petroleum Company.

7811—Hugoton Field, Stevens County, Kansas—Northern Natural Gas Company.

7812—Washington District, Calhoun County, West Virginia—Godfrey L. Cabot, Inc.

7813—Glenville District, Gilmer County, West Virginia—Equitable Gas Company.

Docket No. G—Location of Field—Buyer.

7815—East Panhandle Field, Gray County, Texas—Warren Petroleum Company.

7816, 7821 and 7822—Lisbon Field, Lincoln and Claiborne Parishes, Louisiana—Mississippi River Fuel Corporation; Arkansas-Louisiana Gas Company; H. W. Klein.

7823—Ignacia Field, La Plata County, Colorado; Wasson Field, Yoakum County, Texas—El Paso Natural Gas Company; Shell Oil Company; Coltexo Corporation.

7824—West Panhandle Field, Gray County, Texas—Cities Service Gas Company.

7825—Lisbon Field, Claiborne and Lincoln Parishes, Louisiana—Arkansas-Louisiana Gas Company.

7839 and 7844—Sucker Creek Field, Pike County, Kentucky—Kentucky West Virginia Gas Company.

7840—Virgie Field, Pike County, Kentucky—United Fuel Gas Company.

[fol. 156]

7841—Wolfe Creek Field, Martin County, Kentucky—United Fuel Gas Company.

7842—Right Beaver Creek Field, Knott County, Kentucky—Kentucky West Virginia Gas Company.

7843—Johns Creek Field, Floyd County, Kentucky—Kentucky West Virginia Gas Company.

7851—South Porter Field, Karnes County, Texas—United Gas Pipe Line Company.

7852—Live Oak County, Texas—Transcontinental Gas Pipe Line Corporation.

8083—Langmat Pool, Lea County, New Mexico—El Paso Natural Gas Company.

Pursuant to due notice, a public hearing was held in Washington, D. C., on May 21, 1956, respecting the matters involved in and the issues presented by the application. No petition to intervene or protest to the granting of the application has been received. Staff counsel moved

orally at the hearing that the intermediate decision procedure be omitted and the Commission render a decision herein pursuant to Section 1.30 (c) (1) of the Commission's Rules of Practice and Procedure.

The Commission FINDS:

(1) Applicant, an independent producer of natural gas, is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

[fol. 157] (2) The sale of natural gas hereinbefore described, as more fully described in the application, is made in interstate commerce, subject to the jurisdiction of the Commission, and such sale by Applicant, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(4) The sale of natural gas by Applicant, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned.

(5) A request during the public hearing by Staff Counsel for omission of the intermediate decision procedure under Section 1.30 (c) of the Commission's Rules of Practice and Procedure, was unopposed by any party of record and, not having been denied by the Commission, is granted pursuant to Section 1.30 (c) (1) of said Rules.

The Commission ORDERS:

(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this

order, authorizing the sale by Applicant of natural gas in [fol. 158] interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

(B) The certificate issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicant within 30 days from issuance of this order.

(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the service herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Applicant. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

[fol. 159] By the Commission. Commissioner Digby concurring, subject to the statement attached.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

DIGBY, Commissioner, concurring:

I concur in the order granting a certificate of public convenience and necessity to sell natural gas. I object to any reference in the order concerning the issuance of a cer-

tificate of public convenience and necessity for the facilities of the independent producer or gatherer of gas.

A certificate of public convenience and necessity is neither required nor properly issued for construction and operation of facilities of a producer or gatherer. The action of a majority of this Commission issuing a certificate for facilities is improper for it represents an assertion of power denied to us by Congress.

We have recognized the absence of power over facilities when, in Order No. 174 and Order No. 174-A, we failed to provide any procedure whereby application could be made for a certificate authorizing their construction and operation. We did promulgate procedural rules to enable filing of applications for certificates authorizing a sale or transportation. There was not even a suggestion that at some later time we would authorize or require authorization for construction and operation of facilities.

The action heretofore taken, insofar as it made no provision with respect to facilities, was wholly consistent with the declarations of the Supreme Court in Federal Power [fol. 160] Commission v. Panhandle Eastern Pipe Line Company, 337 U. S. 498, 505; Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 598; Interstate Natural Gas Company v. Federal Power Commission, 331 U. S. 682, 690-691, and Phillips Petroleum Company v. State of Wisconsin, 74 Sup. Ct. 794, 797-798. The language of the Court in these cases is clear and unambiguous. In Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, the Court stated that the "natural and clear meaning" of production or gathering contained in Section 1(b) of the Act encompassed "the producing properties and gathering facilities of a natural-gas company." In Colorado Interstate Gas Co. v. Federal Power Commission, supra, the Court stated that the production or gathering exemption applies to the "physical activities, facilities and properties used in the production and gathering of natural gas." In Interstate Natural Gas Company v. Federal Power Commission, supra, the Court stated that effect must be given to the exemption of producing and gathering, and indicated clearly that facilities, properties and activities of a producer and gatherer were

exempted. The Court, in Phillips Petroleum Company v. State of Wisconsin, supra, held only that a sale in interstate commerce for resale was not within the exemption of Section 1(b). The discussion with respect to facilities and the recitation of the above-cited cases represents clear recognition of the intended scope and effect of the exemption as regards facilities.

The issue to be resolved is whether the Natural Gas Act requires that a certificate of public convenience and necessity issue for construction and operation of the facilities necessary to effect a sale by a producer or gatherer in inter- [fol. 161] state commerce for resale. The issue is not whether a sale of gas in interstate commerce for resale can be made without facilities. It cannot be doubted that facilities necessary to effect a sale of natural gas in interstate commerce are facilities used in interstate commerce. Recognition of this fact cannot, however, create power in this Commission to issue, much less to require, certificates authorizing construction and operation of such facilities.

[fol. 162]

BEFORE THE FEDERAL POWER COMMISSION

Received Aug. 13, 4 31 PM '57.

100-2 Formal.

G13059.

Official File Copy.

To: Docket RGC.
Init.: GB, DM.
Date 8-14, 9/12.
Central Files.

Sun Oil Company
Southwest Division.
Rio Grande National Building
P. O. Box 2880
Dallas 21, Texas

S. M. Gladney
Manager
T. F. Hill
Assistant Manager

Natural Gas Department

August 12, 1957

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

Pursuant to the requirements of Section 154.92 (b) of the Commission's regulations, as amended by Order No. 174-B, there are transmitted herewith for filing as a rate [fol. 163] schedule three copies of a contract between Sun Oil Company (Southwest Division) and the purchaser named below providing for a sale of gas which is proposed to be initiated subsequent to the issuance of Order No. 174-B.

Purchaser—Date of Contract.

Southern Natural Gas Company—August 1, 1957.

Such contract contains the terms and conditions of service and all rates and charges for the sale to be made thereunder. Sun Oil Company has no knowledge with respect to the ultimate point of consumption of the gas to be sold under such contract.

There are also enclosed three copies of a statement showing estimated sales and billing for the first month of service under such contract and showing the proposed date of commencement of service.

A copy of this letter and the enclosures have been mailed to the purchaser.

It is anticipated that the sale of gas under such contract will be initiated promptly upon receipt of disclaimer of jurisdiction or of acceptance of statement of intention to invoke Section 157.28 of the Commission's Regulations, and an application for such disclaimer or for certificate and a statement of intention to invoke Section 157.28 are being filed contemporaneously herewith. Therefore, it is requested that the rate schedule submitted herewith be permitted to be effective on less than 30 days' notice, in accordance with Section 154.98 of the Commission's Regulations. Good cause for such waiver of notice is shown in such statement of intention to invoke Section 157.28, to which reference is here made.

[fol. 164] With regard to this filing, address communications to: G. B. Bennett, Box 2880, Dallas, Texas, and H. D. Coe, Suite 1208, 1700 "K" Street N. W., Washington 6, D. C.

This filing is made under compulsion of the Commission's Order No. 174-B without admitting the validity of such order and without admitting that the Federal Power Commission has jurisdiction over either Sun Oil Company or the subject matter of this filing, and without prejudice to the rights of Sun Oil Company to contest the validity of said order, and without prejudice to its right to contest

the jurisdiction of the Commission over the subject matter of this filing.

Yours very truly,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By G. B. BENNETT,
(G. B. Bennett),
Superintendent Natural Gas Department.

[fol. 165]

BEFORE THE FEDERAL POWER COMMISSION.

APPLICATION FOR A DISCLAIMER OF JURISDICTION OR, IN THE ALTERNATIVE, AN APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Received Aug. 13, 4 32 PM '57.

In the Matter of:

Sun Oil Company (Southwest Division).
Docket No. G-13059.

Sun Oil Company (Southwest Division), hereinafter referred to as "Sun", hereby applies for an Order of the Commission disclaiming jurisdiction over the facilities and sale of natural gas hereinafter described, or, in the alternative, without waiving its position that its facilities and sale of natural gas are not subject to the Commission's jurisdiction, Sun hereby applies for a certificate of public convenience and necessity, pursuant to the Commission's Order No. 174-B, to authorize the sale by Sun of its gas.

I.

In support of this application, Sun, for a Disclaimer of Jurisdiction, respectfully shows:

Sun is a corporation organized under the laws of the State of New Jersey. Its principal business is the production, transportation, refining, and selling of crude oil, and

the marketing of refined products recovered from crude oil. Incidental to its principal business, it has for many years been engaged, and is now engaged, in the business [fol. 166] of producing and gathering natural gas, and in selling a part of the gas which it produces to purchasers which are natural-gas companies within the meaning of the Natural Gas Act. The gas which Sun sells to natural-gas companies is being sold and delivered from facilities which are not under the Commission's jurisdiction, and Sun does not own or operate facilities which are under the jurisdiction of the Commission. The foregoing statement applies with equal force to the sale of gas hereinafter described, to be made under the terms of a contract entered into subsequent to the issuance of Order 174-B. Consequently, Sun is engaged, and will be engaged after the commencement of the sale hereinafter described, solely in the production and gathering of natural gas within the meaning of Section 1 (b) of the Natural Gas Act and is not a "natural-gas company" as defined in the Act. Moreover, the sale of gas hereinafter described is a local or intrastate sale and not a sale "in interstate commerce" within the meaning of Section 1(b) of the Natural Gas Act.

This application is filed under compulsion of the Commission's Order No. 174-B issued in Docket No. R-138 on December 17, 1954. Sun does not admit the validity of such order but on the contrary contests the validity of such order and denies the Commission's jurisdiction over either Sun or its facilities or its sales (including the sale hereinafter described) or any of its operations. This application is filed without prejudice to Sun's right to contest the validity of the aforesaid order and without prejudice to its right to contest the jurisdiction of the Commission over Sun and the subject of this application.

[fol. 167] It is therefore respectfully submitted that the Commission should issue an order disclaiming jurisdiction as herein requested.

II.

Without waiving its position that Sun's facilities, sales (including the sale hereinafter described), and operations

are not subject to the Commission's jurisdiction, Sun, in support of its request that a certificate of public convenience and necessity be issued to authorize the sale hereinafter described, respectfully shows:

(1) The exact legal name of the applicant is Sun Oil Company. It is a corporation organized and existing under the laws of the State of New Jersey. The location of Sun's principal place of business is Philadelphia, Pa. It is authorized to do business in each and all of the United States.

(2) Sun has no knowledge of any predecessor in interest bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The names, title and post office address of the persons to whom correspondence or communications in regard to this application should be addressed are: G. B. Bennett, Superintendent, Natural Gas Department, Box 2880, Dallas, Texas, and H. D. Coe, Suite 1208, 1700 "K" Street, N. W., Washington 6, D. C.

(4) As stated above, Sun denies that it is a natural-gas company and denies that it will be a natural-gas company [fol. 168] with respect to the sale hereinafter described, and denies that it was, on June 7, 1954, or will be after the commencement of the sale hereinafter described, engaged in either the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale.

Sun now proposes to sell and deliver gas under the terms of a contract with the following Purchaser:

Southern Natural Gas Company, Date of Contract: Aug. 1, 1957,

which contract is being filed contemporaneously herewith as a rate schedule, and to which reference is here made for all purposes of this application.

(i) The source of gas to be produced by applicant for such sale is:

(a) Name and approximate location of field:

Gwinville Field, N/2 of Jefferson Davis County, Miss.

(b) Point or points of delivery:

Same as (a) above.

(ii) Sun will not be engaged in the transportation of natural gas in interstate commerce and will not own any pipe lines so transporting natural gas and subject to the jurisdiction of the Commission. The gas to be delivered by Sun to said Purchaser will be transported by such Purchaser but Sun does not have knowledge of the detailed [fol. 169] route or routes through which such Purchaser will transport such gas.

(iii) Sun does not propose to serve any communities either at wholesale or at retail.

(iv) Sun does not propose to deliver any gas to any main line industrial customers.

(v) In connection with such sale Sun owns the following major appurtenant properties and facilities:

None.

III.

There is attached hereto the following exhibit:

Exhibit "A". A general map of applicant's facilities for the production, gathering, or sale of natural gas to the purchaser, designated above at the location indicated on said map, showing the information designated in Section 157.25 of the Commission's regulations as amended by Order 174-B.

Applicant's description or showing of any facilities in this application or in any exhibit attached hereto is intended only for the information of the Commission, and not for the purpose of requesting a certificate of public convenience and necessity for the construction or operation of such facilities. This application is hereby made only for a certificate of public convenience and necessity authorizing the sale of gas in the circumstances above described. Ap- [fol. 170] plicant does not herein represent any person, individual, or corporation, other than Sun Oil Company.

As stated hereinabove, the contract covering the sale of gas which is the subject of this application is being filed contemporaneously herewith as a rate schedule, and said contract is incorporated herein by reference.

Wherefore, Sun respectfully requests that (a) the Commission without a hearing issue the disclaimer of jurisdiction herein requested, or (b) in the alternative, and without waiving Sun's position that the Commission lacks jurisdiction over Sun, its facilities and operations and the sale of gas herein described, that the Commission issue the certificate of public convenience and necessity herein requested. Sun requests that, in the event the disclaimer of jurisdiction herein requested is not granted, this application be disposed of in accordance with the shortened procedure provided for in Section 1.32 of the Commission's Rules and Regulations. In accordance with said rule, Sun hereby requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission.

Respectfully submitted,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By G. B. BENNETT,
(G. B. Bennett),
Superintendent Natural Gas Department.

P. O. Box 2880,
Dallas, Texas.

[fol. 171] State of Texas,
County of Dallas. ss.

G. B. Bennett, being first duly sworn, deposes and says that he is Superintendent of the Natural Gas Department of Sun Oil Company (Southwest Division) that he has read the foregoing Application for a Disclaimer of Jurisdiction or, in the Alternative, a Certificate of Public Convenience and Necessity and Temporary Certificate, by him subscribed; that he knows the contents thereof; that he is authorized as such Superintendent to subscribe to such Application for and on behalf of said Company; and that the facts therein set forth are true and correct to the best of his knowledge and belief.

G. B. Bennett.

Subscribed and sworn to before me this 12th day of August, 1957.

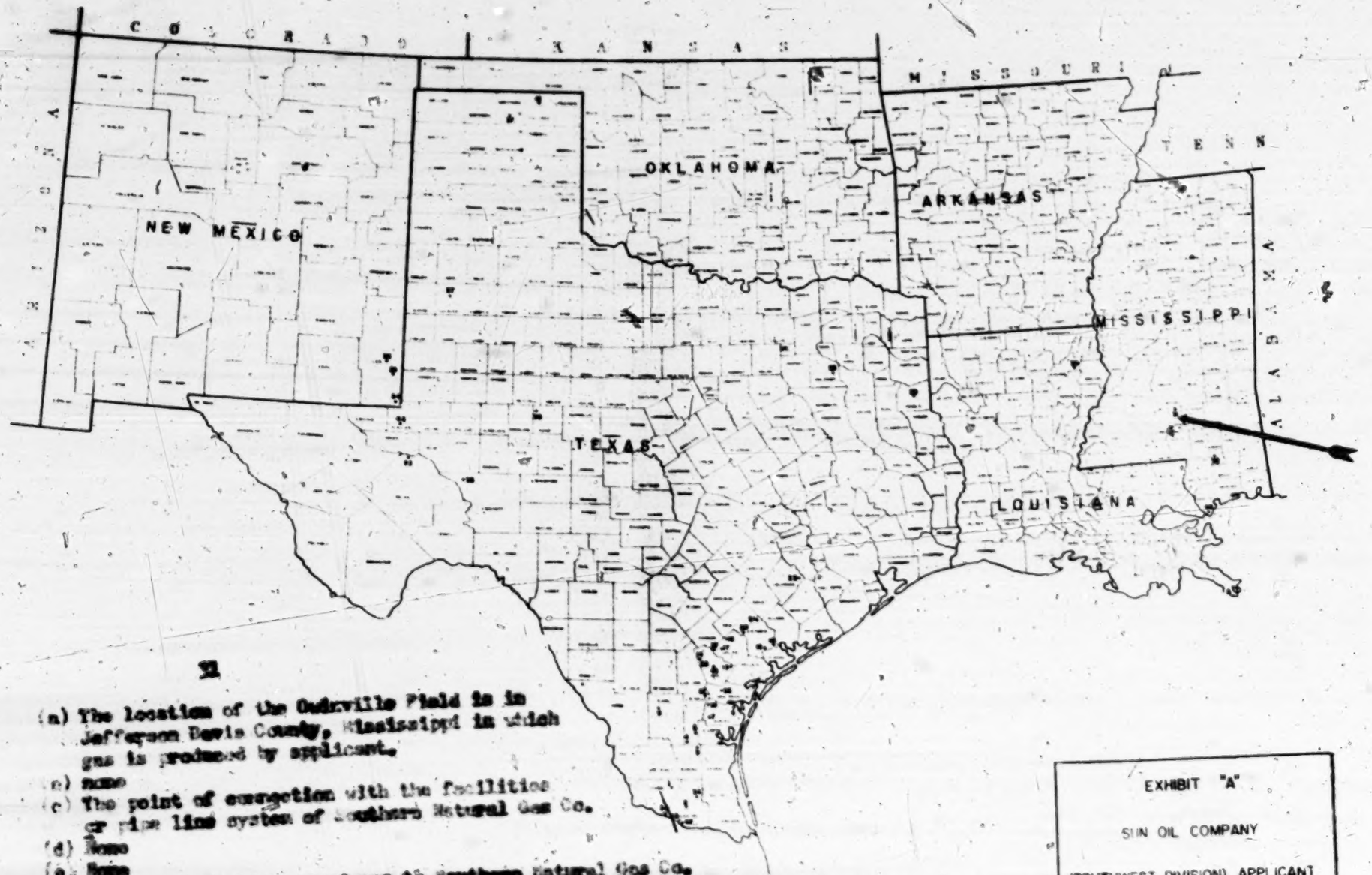
Katherine Lovett,
(Katherine Lovett),
Notary Public in and for
Dallas County, State of
Texas.

(Seal)

[fol. 172]

Exhibit "A"

(See Opposite) ☞



XI

(a) The location of the Oakville Field is in Jefferson Davis County, Mississippi in which gas is produced by applicant.

(b) None

(c) The point of connection with the facilities or pipe line system of Southern Natural Gas Co.

(d) None

(e) None

(f) The point of delivery of gas to Southern Natural Gas Co.

EXHIBIT "A"

SUN OIL COMPANY

(SOUTHWEST DIVISION) APPLICANT

[fol. 172]

EXHIBIT "A"

[fol. 173]

BEFORE THE FEDERAL POWER COMMISSION

Received Aug. 19, 11 06 AM '57.

100-2 Formal.

G-13059.

Official File Copy.

To: Docket RGC.
Init.: DM.
Date: 8/23.
Central Files.

Sun Oil Company
Southwest Division
Rio Grande National Building
P.O. Box 2880
Dallas 21, Texas

Natural Gas Department

S. M. Gladney
Manager
T. F. Hill
Assistant Manager

August 16, 1957

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

Please refer to our letter dated August 12, 1957, filed with the Commission on August 13, 1957, transmitting for filing as a Rate Schedule three copies of a contract between Sun Oil Company and Southern Natural Gas Company dated August 1, 1957.

[fol. 174] The last paragraph on page 1 of our letter was inadvertently included stating our intention to invoke Sec-

tion 157.28 of the Commission's Regulations. It is not our intention to invoke Section 157.28 at this time; therefore, we would appreciate your disregarding this paragraph in our letter.

Yours very truly,

SUN OIL COMPANY (SOUTHWEST DIVISION),

By G. B. BENNETT,
(G. B. Bennett),
Superintendent, Natural Gas Department.

DHV:me
cc: Southern Natural Gas Company
Watts Building
Birmingham 2, Alabama
Attn: Mr. H. D. McHenry

BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-13059.

Sun Oil Company

Sept. 12, 1957

Sun Oil Company
Box 2880
Dallas, Texas

Attention: Mr. G. B. Bennett.

Gentlemen:

This is with reference to your application for a certificate of public convenience and necessity in Docket No. G-13059 [fol. 175] and your tender, by letter of August 12, 1957, of the related proposed rate schedule consisting of a contract dated August 1, 1957 with Southern Natural Gas Company.

Such certificate application covers certain acreage in the Gwinville Field, N/2 of Jefferson Davis County, Missis-

sippi, and duplicates the acreage covered by the certificate issued to your company in Docket No. C-6658. Such previously issued certificate is still applicable to the gas sales from the acreage even though the terms of the gas sales contract dated August 26, 1947 (which you incorporated by reference in such certificate application) has expired. In view of such duplication, your application for a certificate of public convenience and necessity in Docket No. G-13059 is hereby rejected. A copy of such application is returned herewith.

In regards to your tender of new contract dated August 1, 1957 as the rate schedule covering the sale of gas from certain units in the Gwinville Field to Southern Natural, such proposed rate schedule duplicates sales from units covered by your existing FPC Gas Rate Schedule No. 55 and such proposed rate schedule embodies a change in the effective rate for gas sales from such units. The proposed new rate schedule should be submitted as superseding your existing rate schedule and be submitted in accordance with Section 154.94 of the Commission's Regulations, Changes in Rate Schedules.

Since your rate schedule tender does not comply with Section 154.94 of the Commission's Regulations, it is hereby rejected and all copies returned herewith. Such rejection is without prejudice to the retender of the proposed rate [fol. 176] schedule accompanied by the material required by Section 154.94.

Very truly yours,

MICHAEL J. FARRELL,
Acting Secretary.

Enclosure No. 117819

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR REHEARING.

Received Oct. 10, 4 08 PM '57.

Comes now Sun Oil Company (hereinafter referred to as "Sun") and, pursuant to the provisions of Section 19(a)

of the Natural Gas Act and Section 1.34 of the Commission's Rules and Regulations, being an aggrieved party, hereby applies for rehearing and reconsideration of the Commission's letter order issued September 12, 1957, purporting to reject Sun's application for a certificate of public convenience and necessity in Docket No. G-13059 and purporting to reject Sun's related rate schedule filing. In support of this application for rehearing, it is respectfully represented as follows:

I.

Under date of August 1, 1957, Sun, as Seller, and Southern Natural Gas Company, as Buyer, entered into a contract providing for the sale and purchase of gas produced from certain described properties located in the Gwinville Field, Jefferson Davis County, Mississippi, for a term of [fol. 177] twenty years from and after September 3, 1957.

On August 13, 1957, Sun filed with the Commission an application for a certificate of public convenience and necessity covering the above mentioned sale of gas. The application was docketed by the Commission as Docket No. G-13059.

Likewise on August 13, 1957, Sun filed with the Commission as Sun's rate schedule covering the above mentioned sale of gas, along with other documents, a copy of Sun's contract of August 1, 1957, with Southern Natural Gas Company.

Both the application for certificate and the rate schedule filing were prepared and submitted in accordance with all formal requirements of the Natural Gas Act and the Commission's Rules and Regulations under the Natural Gas Act.

In its letter order of September 12, 1957, at which this application for rehearing is directed, the Commission, acting through its Acting Secretary, purported to reject said application for a certificate of public convenience and necessity and to reject said rate schedule.

The letter order of September 12, 1957, makes reference to a certificate issued to Sun in Docket No. G-6658 and to Sun's FPC Gas Rate Schedule No. 55. The certificate and rate schedule thus referred to covered a distinct and separate sale of gas to Southern Natural Gas Company under a contract dated August 26, 1947, which contract by its own

[fol. 178] terms, set out in Article XIV thereof, expired and terminated at the expiration of the stipulated ten-year term on September 3, 1957.

I.

The letter order of September 12, 1957, is unlawful for the following reasons:

Sun's contract of August 26, 1947, with Southern Natural Gas Company, which is on file with the Commission as Sun's FPC Gas Rate Schedule No. 55, expired and terminated by its own terms at the expiration of the stipulated term of the contract on September 3, 1947. Sun's contract of August 1, 1947, with Southern Natural Gas Company, which the Commission has purported to reject as a rate schedule, covers an entirely distinct and separate sale of gas to Southern Natural Gas Company. Sun is, therefore, entitled to file such contract of August 1, 1957, as an initial rate schedule under the provisions of Section 4(c) of the Natural Gas Act and Section 154.92(b) of the Commission's Regulations. Since Sun's rate schedule filing clearly falls within the scope of those provisions as an initial rate schedule, the Commission is without authority, either under the statute or under its own regulations, to reject such initial filing.

Section 4(c) of the Act provides that, " . . . every natural-gas company shall file with the Commission, . . . and shall keep open in convenient form and place for public inspection, SCHEDULES SHOWING ALL RATES AND CHARGES FOR ANY transportation or SALE subject to the jurisdiction of the Commission, . . ."[1] Under Section [fol. 179], 154.92(b) of the Commission's Regulations, "Every independent producer who, . . . proposes to INITIATE an interstate transportation or SALE of natural gas subject to the jurisdiction of the Commission to an EXISTING or new CUSTOMER shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be INITIATED a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service

[1] All emphasis is supplied in this application for rehearing.

and all rates and charges for such transportation or sale. . . "

Within the meaning of these provisions Sun's contract of August 1, 1957, accomplishes a SALE of natural gas and such sale is entirely separate and distinct from any other sale. Even the Commission's Regulations recognize that such a separate and distinct sale may be made to an EXISTING customer without losing its identity as a separate and distinct sale. Hence, Sun is entitled, and even required, by the statute and the regulations to file an initial rate schedule covering such sale. Sun's contract of August 1, 1957, constitutes its rate schedule for the sale under the provisions of both Section 4(c) of the Natural Gas Act and Section 154.93 of the Commission's Regulations. Hence, Sun's filing of its contract of August 1, 1957, as its initial rate schedule for the sale covered thereby met all formal requirements of the statute and the regulations and the Commission was without authority to reject the filing.

By the same token, Sun's contract of August 1, 1957, may not lawfully be treated as a change in rate schedule, [fol. 189] nor may Sun lawfully be required to file the contract as a change in rate schedule in order to make its terms effective. The earlier contract of August 26, 1947, filed and designated as Sun's FPC Gas Rate Schedule No. 55, expired and terminated by its own terms. It no longer exists as the basis for any change. The contract of August 1, 1957, purportedly rejected by the Commission, is in no sense a "change" in the earlier contract or in the prices set out therein, but is rather a separate and distinct contract covering an entirely separate and distinct sale. There is no relationship between the two contracts which can properly be made the basis for any theory that the later contract is a "change" in the earlier contract or that the later contract "supersedes" the earlier contract, nor does the sale accomplished by the later contract "duplicate" the sale accomplished by the earlier contract under any valid theory.

Sun's contract of August 1, 1957, can not validly be treated as a "change" in rate or rate schedule within the meaning of Sections 4(d) and (e) of the Natural Gas Act. Therefore, the Commission's order of September 12, 1957,

unlawfully required that such contract be submitted, if at all, "in accordance with Section 154.94 of the Commission's Regulations, Changes in Rate Schedules."

Even under the Commission's Regulations, Sun's contract of August 1, 1957, is not a "change" in the earlier contract with Southern Natural Gas Company which had been filed and designated as Sun's FPC Gas Rate Schedule No. 55, nor is it a "change" in such rate schedule. Under Section 154.93 of the Regulations, Sun's Rate Schedule No. 55 con-
[fol. 181] sisted exclusively of the "basic contract" of August 26, 1947 "and all supplements or agreements amendatory thereof." Such basic contract has not been supplemented or amended since the initial filing thereof with the Commission by Sun as a rate schedule, and such basic contract came to a complete end by its own terms as of September 3, 1957. Sun does not seek to make any supplement or amendment to such contract or to the rate schedule which consists of such contract, or to change the rate contained therein, but only to make effective an entirely separate and distinct sale of gas under an entirely separate and distinct contract. Section 154.94 of the Commission's Regulations is not applicable to such a state of facts where there is no proposal to change an existing rate or rate schedule covering an existing sale. If such section of the Regulations be construed by the Commission as applicable to such facts, then such section of the Regulations is in conflict with Section 4 of the Natural Gas Act and is necessarily void.

It is clear from the Natural Gas Act that the Commission's power to apply the provisions of Sections 4(d) and (e) thereof is limited exclusively to a "change" in rates and does not extend to the "initial filing" thereof, as is the case here. The only provisions in the Act for action by the Commission with respect to rates and charges filed initially by a natural-gas company are to be found in Section 5 of the Act, which action can only be taken after hearing and on the basis of proper findings.

The Commission's letter order of September 12, 1957, is invalid also because it is in conflict with the decisions of the Supreme Court of the United States in *United Gas*
[fol. 182] *Pipeline Co.* v. *Mobile Gas Service Corp.*, 350

U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Sun's contract of August 1, 1957, does not constitute a modification or amendment newly changing a previously filed rate schedule. As was made plain by the Supreme Court in the *Mobile* case, the basic scheme of the Natural Gas Act is to permit rates to be determined in the first instance by natural-gas companies, by contract or otherwise; the intail rate-setting powers are with the natural-gas companies. Under the Court's analysis of the Act, Sun's contract of August 1, 1957, constitutes an exercise by Sun of its INITIAL RATE-SETTING POWER and the Commission is without authority to treat the contract as a "change" within the meaning of Section 4 of the Act.

In this case the contract comprising the previously filed rate schedule has terminated and expired by its own terms. The ONLY rate established by agreement of the parties from and after September 3, 1957, is the price set out in the contract of August 1, 1957. Hence, by issuing the order purporting to reject the rate schedule filing the Commission has done what the Supreme Court said it has no power to do in the *Mobile* case. It has usurped the right reserved to natural-gas companies by the Act to establish their rates initially. This is so because the price which the Commission purports to continue in effect, in the absence of a "change" filed and permitted to become effective under Section 4 of the Act, can not be rested upon any contract between the companies involved. The contract which gave rise to such price initially has terminated and expired by [fol. 183] its own terms. A separate and distinct sale and purchase of gas has been made by the parties under the contract of August 1, 1957, and the Commission may not lawfully refuse to permit Sun to file such contract as its initial rate schedule.

The Commission's letter order of September 12, 1957, is invalid because under Sections 4 and 5 of the Natural Gas Act, prescribing the procedure to be followed by the Commission with respect to rate schedule filings, the Commission is not authorized to reject a rate schedule filing

meeting all formal requirements. That the Commission lacks statutory power to reject a gas rate schedule filing was authoritatively determined by the United States Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, 902 (1953), where an order of the Commission purporting to "reject" a tariff schedule filing was set aside.

The Commission's order is unlawful for the further reason that the Commission is without authority to reject Sun's application for a certificate of public convenience and necessity. Such application conformed to all formal requirements of the Natural Gas Act and the Commission's Regulations. Under Section 7(c) of the Act Sun's contract of August 1, 1957, is a contract by which Sun proposes to ENGAGE in a SALE of gas for which a certificate is both permitted and required. Such sale is separate and distinct from any other sale, and is not a continuation of another sale. Moreover, with respect to such sale Sun meets all of the qualifications imposed by Section 7(e) of the Act. Under Section 157.23(b) of the Commission's Regulations [fol. 184] implementing the foregoing provisions of the Natural Gas Act the sale of gas covered by Sun's contract of August 1, 1957, is a "new" sale for which a certificate again is both permitted and required. Therefore, the Commission's purported rejection of Sun's application for a certificate is contrary to both the Natural Gas Act and the Commission's own Regulations.

The Commission's order purporting to reject Sun's application for certificate is unlawful for the reason that such purported action was taken without according to Sun a hearing on its application for certificate pursuant to the mandatory requirements of Section 7(c) of the Natural Gas Act. Such section requires that in all certificate cases "the Commission SHALL set the matter for hearing." The mandatory character of this requirement of a hearing on all certificate applications was recognized and enforced in *Northeastern Gas Transmission Company* v. *Federal Power Commission*, 195 F.2d 872, 880 (3rd Cir. 1952), cert. denied, 344 U.S. 818, where the Court held that the natural-gas company was entitled to a hearing on its certificate application "as a matter of right."

The Commission's order purporting to reject Sun's initial rate schedule filing is unlawful for the reason that such purported action was taken without according to Sun the hearing which is required by Section 5 of the Act as a prerequisite to any modification of Sun's rate schedule and without making the findings which are required by such section as a prerequisite to such modification.

[fol. 185] The Commission's order is unlawful for the reason that the Commission failed to give notice to Sun and failed to accord to Sun an opportunity for hearing, contrary to the Natural Gas Act, the Administrative Procedure Act, and the due process clause of the Fifth Amendment to the Constitution of the United States.

The Commission's order is unlawful for the reason that the order lacks adequate and proper findings of fact and conclusions of law in support of the Commissions ultimate conclusions therein, contrary to the Natural Gas Act (particularly Sections 4, 5 and 7 thereof), the Administrative Procedure Act (particularly Section 8(b) thereof), and the Fifth Amendment to the Constitution of the United States. The Commission's ultimate conclusions set out in the order are plainly not related by the Commission, by adequate findings, to the requirements of the Natural Gas Act with respect to rate schedule filings and certificate applications, as such requirements are discussed above in this application for rehearing. Moreover, the order of the Commission is not supported by substantial evidence and it is, therefore, unlawful. This deficiency is particularly glaring with regard to the Commission's findings that "such proposed rate schedule duplicates sales from units covered by your existing FPC Gas Rate Schedule No. 55" and that "such proposed rate schedule embodies a change in the effective rate for gas sales from such units."

Wherefore, Sun Oil Company respectfully requests that the Commission grant this application for rehearing of its order of September 12, 1957, and accord Sun Oil Company [fol. 186] such other and further relief as appears appropriate.

Respectfully submitted,

SUN OIL COMPANY,

Original signed by:

By LEO J. HOFFMAN,
(Leo J. Hoffman),
Its Attorney.
MARTIN A. ROW,
LEO J. HOFFMAN,

P. O. Box 2880,
Dallas Texas.

ROBERT E. MAY,
MAY, SHANNON and MORLEY,

1700 K Street, N.W.,
Washington 6, D.C.

Attorneys for Sun Oil Company.

Dated October 9, 1957.

The State of Texas,
County of Dallas.

Leo J. Hoffman, being first duly sworn, deposes and says that he is Attorney for Sun Oil Company that as such he has signed the foregoing Application for Rehearing for an in behalf of said Company; that he is authorized so to do; that he has read said Application for Rehearing and is familiar with the contents thereof; and that the matters and things set forth are true and correct to the best of his information, knowledge and belief.

[fol. 187] Original Signed by:

LEO J. HOFFMAN,
(Leo J. Hoffman).

Subscribed and sworn to before me, a Notary Public, this 9th day of October, 1957.

RUTH DEWITT,
(Ruth DeWitt),
Notary Public in and for
Dallas County, Texas.

(Seal)

My Commission expires June 1, 1959.

Certificate of Service.

I hereby certify that I have this day served a copy of the foregoing Application for Rehearing of Sun Oil Company by mailing a copy thereof, postage prepaid, to the following:

Southern Natural Gas Company
Watts Building,
Birmingham 2, Alabama.

Dated at Dallas, Texas, this 9th day of October, 1957.

Original Signed by:

LEO J. HOFFMAN,
(Leo J. Hoffman),
Attorney for Sun Oil Company.

[fol. 188]

BEFORE THE FEDERAL POWER COMMISSION

ORDER DENYING MOTION FOR RECONSIDERATION—
Issued November 8, 1957

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Sun Oil Company (Sun), on October 10, 1957, filed in this proceeding a petition for reconsideration of the Commission's action by letter of September 13, 1957, rejecting Sun's application filed on May 3, 1957, for a certificate of public convenience and necessity, and a contract related thereto dated August 1, 1957, covering sales to Southern Natural Gas Company (Southern Natural) of natural gas produced from Gwinville Field, Jefferson Davis County, Mississippi, at a proposed rate of 20 cents per Mcf, which was tendered as an initial rate schedule.[1]

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[1] The document tendered by Sun is captioned as an "Application for Rehearing". Such an application may not be filed in this matter under our rules (Sec. 1.30(e)). However, we have accepted and considered the document as a motion for reconsideration.

The Commission's rejection of the application and the proposed filing of the contract was based upon the fact that a previously issued certificate, in Docket No. G-6658, is still applicable to gas sales from the same gas producing acreage in Gwinville Field to the same buyer, Southern Natural, and that an existing effective rate schedule, Sun's [fol. 189] FPC Gas Rate Schedule No. 55, and supplements thereto, cover the continued service from that acreage even though the contract permitted to be filed as such rate schedule contains a termination date of September 3, 1957.[2] By another order issued this date we have provided that Sun's proposed rate schedule be accepted for filing as a proposed change in rates and have designated it as Supplements Nos. 3 and 4 to Sun's FPC Gas Rate Schedule No. 55.

THE COMMISSION FINDS:

The alleged assignments of error and the grounds advanced by Sun for reconsideration of the Commission's rejection of Sun's application filed May 3, 1957, for a certificate of public convenience and necessity as above described set forth no facts or principles of law which either were not fully considered by the Commission when it issued the said letter, or which having been now considered warrant either the modification or the vacation of such letter.

THE COMMISSION ORDERS:

The petition for reconsideration filed herein by Sun Oil Company on October 10, 1957, be and it is hereby denied.

By the Commission. Commissioner Digby dissenting.

J. H. GUTRIDE,
(Joseph H. Gutride),
Secretary.

[fol. 190] DIGBY, Commissioner, DISSENTING:

I am forced to dissent in this proceeding not only in the action of the Commission in overruling the motion for

[2] Sun has not, pursuant to Section 7 (b) obtained any approval of termination or abandonment of service under the existing rate schedule which provides the rate of 7.36 cents per Mcf.

rehearing of the letter order dated September 12, 1957, but also in the authority and wisdom of issuing the original rejection. It is my view that the application for certificate of public convenience and necessity and rate schedule filing should have been accepted and at least fixed for hearing to determine whether or not the action is an increase in an existing rate or an initial rate. The letter of rejection was sent out by the Secretary under his delegated authority but was not by the direction of the Commission. The fact that the land description or geographical area in the new filing may be the same as that in the old contract is not controlling. Certainly if the production is from a different reservoir than that covered by the old contract, it should be treated as an initial filing. I feel that the matter should have been set for hearing with the interested parties given an opportunity to present the facts and make a record from which the Commission could determine the issues.

S. L. Digby,
Commissioner.

[fol. 191]

Before the Federal Power Commission

Order Denying Motion for Reconsideration. Errata Notice—Issued November 8, 1957

(December 6, 1957.)

On first page, second paragraph, last sentence, change:

"Supplements Nos. 3 and 4 to Sun's FPC Gas Rate Schedule No. 55" to read as follows:

"Sun's FPC Gas Rate Schedule No. 87 and Supplement No. 1 thereto."

J. H. Gutride,
(Joseph H. Gutride),
Secretary.

Memorandum for Files.

Copy of Errata Notice sent to all persons receiving a copy of the order issued in the above-entitled matter.

cc: OGC.
MRH:sdp—12/6/57.

[fol. 192]

BEFORE THE FEDERAL POWER COMMISSION

ORDER FOR HEARING AND SUSPENDING PROPOSED CHANGES IN RATES—Issued November 8, 1957

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Docket No. G-13664.

Sun Oil Company (Sun) on October 10, 1957, filed a request for reconsideration of the Commission's action of September 13, 1957, rejecting Sun's application for a certificate of public convenience and necessity in Docket No. G-13959 and rejecting Sun's filing of its contract, dated August 1, 1957, providing for sales to Southern Natural Gas Company (Southern Natural) of natural gas produced from Gwinville Gas Company (Southern Natural) of natural gas produced from Gwinville Field, Jefferson Davis County, Mississippi, at a proposed rate of 20¢ per Mcf, which it submitted as an initial rate schedule. By separate order issued concurrently herewith we have denied such motion for reconsideration.

As an alternative to the motion for reconsideration, Sun tendered the above-mentioned contract of August 1, 1957, as a proposed change in rate, with a notice of the change[1] which have been designated as Supplements Nos. 3 and 4 [fol. 193] to Sun's FPC Gas Rate Schedule No. 55.

In support of the proposed increased rates of 20¢ per Mcf, Sun states the price was determined by bargaining at arm's length and constitutes an integral part of the contract consideration. Sun further states the price does not exceed the market price, market value, or commodity value of gas in the area and is just and reasonable, particularly in view of the long term of the contract and the nature and location of the gas reserves.

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[1] Notice of Change dated October 9, 1957, filed October 10, 1957.

The increased rates and charges tendered by Sun have not been shown by Sun to be justified, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

THE COMMISSION FINDS:

It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed change and that the supplements above described be suspended and the use thereof deferred as hereinafter ordered.

THE COMMISSION ORDERS:

(A) Pursuant to the authority of the Natural Gas Act, particularly Sections 4 and 15 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Natural Gas Act (18 CFR, Chapter I), a public hearing be held upon a date to be fixed by notice from the [fol. 194] Secretary, concerning the lawfulness of the proposed increased rates and charges.

(B) Pending such hearing and decision thereon, said supplements be and they are hereby suspended and the use thereof deferred until April 10, 1958, and until such further time as they are made effective in the manner prescribed by the Natural Gas Act.

(C) Neither the supplements hereby suspended, nor the rate schedule sought to be altered thereby, shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

(D) Interested State commissions may participate as provided in Sections 1.8 and 1.37 (f) of the Commission's Rules of Practice and Procedure [18 CFR 1.8 and 1.37 (f)].

By the Commission. Commissioner Digby dissenting.

J. H. Gutride,
(Joseph H. Gutride),
Secretary.

DIGBY, Commissioner, DISSENTING:

I am forced to dissent in this proceeding not only in the action of the Commission in overruling the motion for rehearing of the letter order dated September 12, 1957, but [fol. 195] also in the authority and wisdom of issuing the original rejection. It is my view that the application for certificate of public convenience and necessity and rate schedule filing should have been accepted and at least fixed for hearing to determine whether or not the action is an increase in an existing rate or an initial rate. The letter of rejection was sent out by the Secretary under his delegated authority but was not by the direction of the Commission. The fact that the land description or geographical area in the new filing may be the same as that in the old contract is not controlling. Certainly if the production is from a different reservoir than that covered by the old contract, it should be treated as an initial filing. I feel that the matter should have been set for hearing with the interested parties given an opportunity to present the facts and make a record from which the Commission could determine the issues.

S. L. DIGBY,
Commissioner.

[fol. 196]

BEFORE THE FEDERAL POWER COMMISSION

ORDER FOR HEARING AND SUSPENDING PROPOSED CHANGES IN RATES. ERRATA NOTICE—Issued November 8, 1957

(December 6, 1957).

On first page, second paragraph, last sentence, change: "Supplements Nos. 3 and 4 to Sun's FPC Gas Rate Schedule No. 55" to read as follows:

"Sun's FPC Gas Rate Schedule No. 87 and Supplement No. 1 thereto."

On Second page, in paragraph entitled "The Commission finds and in ordering paragraphs "(B)" and "(C)", change the word supplements to read:

"rate schedule and supplement".

J. H. GUTRIDE,
(Joseph H. Gutride),
Secretary.

Memorandum for Files.

Copy of Errata Notice sent to all persons receiving a copy of the order issued in the above-entitled matter.

cc: OGC
MRH:sdp—12/6/57.

[fol. 197]

BEFORE THE FEDERAL POWER COMMISSION

100-2 Formal.

Docket Nos. G-13059 and G-13664.

Sun Oil Company,

Certified.

95458.

Nov. 13, 1957.

Sun Oil Company
Natural Gas Department
P. O. Box 2880
Dallas 21, Texas

Attention: G. B. Bennett, Supt.

Gentlemen:

Enclosed order(s) issued by the Commission today in the above-entitled matter(s).

Very truly yours,

JOSEPH H. GUTRIDE,
Secretary.

Enclosure(s).

STATE COMMISSION AND GOVERNOR FORM LETTERS SENT TO: (G-13664) Mississippi Public Service Commission, Jackson 5, Mississippi, Hon. James P. Coleman, Governor of Mississippi, Jackson, Miss.

COPY OF ORDERS SENT TO:

Senators—John C. Stennis and James O. Eastland (Miss.)

[fol. 198] H. D. Coe, Esq., Suite 1208, 1700 K St., N. W., Washington 6, D. C.

Southern Natural Gas Company, Watts Building, Birmingham, Alabama.

cc: OGC.
MRH:mt—11/8/57.

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR REHEARING.

Received Dec. 2, 10 40 AM '57.

Docketed L.M.L.

Original.

To: Docket.
Init.: L.M.L.
Date: 12-13.

In the Matter of:

Sun Oil Company.

Docket No. G-13664.

Comes now Sun Oil Company (Sun) and, pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, being an aggrieved party, hereby applies for rehearing of the Commission's order in the above-entitled [fol. 199] proceeding, bearing an issuance date of November 8, 1957 and entitled "Order for Hearing and Suspending Proposed Changes in Rates." In support of this application for rehearing, it is respectfully represented as follows:

I.

This proceeding involves a contract between Sun, as Seller, and Southern Natural Gas Company (Southern), as

Buyer, dated August 1, 1957, and providing for the sale and purchase of gas produced from certain described properties located in the Gwinville Field, Jefferson Davis County, Mississippi, for a term of twenty years from and after September 3, 1957. On August 13, 1957, in a proceeding docketed by the Commission as Docket No. G-13079, Sun filed an application for a certificate covering this new sale, and the aforesaid contract was filed as a related initial rate schedule. By letter order dated September 12, 1957, these filings were purportedly rejected, the letter of rejection reciting that Sun had made a certificate and rate filing under a prior contract with Southern (which expired by its own terms on September 3, 1957) covering a sale from the Gwinville Field and the new contract of August 1, 1957 was erroneously interpreted as a "change" in rate schedule under the Natural Gas Act and the Commission's Regulations thereunder. Thereafter, on October 10, 1957, Sun filed an application for rehearing of this letter order and the Commission, by an order bearing an issuance date of November 8, 1957, erroneously treated the application for rehearing as a motion for reconsideration and further erroneously denied the relief sought in such application.

[fol. 200] II.

Because of the rejection, by the letter order of September 12, 1957, of the new certificate application in Docket No. G-13079 and the related filing of the new contract as an initial rate schedule, Sun was compelled, in order that it might not be further penalized, to file a notice of so-called "change" in accordance with Section 154.94 of the Commission's Regulations. This filing was made under protest and compulsion and with specific reservations with respect to the legality of the letter order and the jurisdiction of the Commission. The order to which this application for rehearing is addressed in Docket No. G-13664, bearing an issuance date of November 8, 1957, erroneously and unlawfully designated this filing as Supplements Nos. 3 and 4 to Sun's FPC Gas Rate Schedule No. 55 and suspended and deferred its use until April 10, 1958.

III.

The order of the Commission, bearing an issuance date of November 8, 1957, in the above-entitled proceeding in Docket No. G-13664, is erroneous and unlawful for the following reasons:

1. As recited therein, the order is based upon the Commission's rejection of Sun's certificate application in Docket No. G-13079 and the rejection of the new contract of August 1, 1957 as an initial rate schedule. Having erroneously rejected these filings, the Commission, in the instant order, has unlawfully assumed the authority to treat and consider the new contract as a "change" in rate schedule under the Natural Gas Act and the Commission's Regulations and to [fol. 201] suspend its effectiveness. For all of the reasons stated in the application for rehearing in Docket No. G-13059 (incorporated herein by reference), the new contract of August 1, 1957 with Southern constituted a new sale of natural gas entirely separate and distinct from any other sale and Sun was entitled to file the new contract as an initial rate schedule under Section 4(c) of the Natural Gas Act and Section 154.93 of the Commission's Regulations. Therefore, the new contract cannot lawfully, as purported to be accomplished by the instant order, be treated and considered by the Commission as a "change" in rate schedule subject to the Commission's power of suspension within the meaning of Section 4(d) and (e) of the Natural Gas Act and may not lawfully be required to be submitted as such a "change" in accordance with Section 154.94 of the Commission's regulations. As held in *United Gas Pipeline Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332, the basic scheme of the Natural Gas Act is to permit prices to be determined in the first instance by natural gas companies, by contract or otherwise.

2. The instant order of suspension is invalid for the further reason that, even assuming, *arguendo*, the Commission had authority to suspend, the order fails to contain a "statement in writing of its [the Commission's] reasons for such suspension" as required by Section 4(e) of the Natural Gas Act.

3. Further assuming, *arguendo*, the Commission's authority to suspend, the instant order is invalid because it was not issued until more than 30 days had elapsed after the date of filing, and was thus in contravention of Section [fol. 202] 4(d) of the Natural Gas Act. Although the Commission addressed a telegram to Sun on November 8, 1957, advising of its action, the order itself was not released until November 13, 1957, which was beyond the statutory period of 30 days. The telegraphical advice to Sun constitutes insufficient compliance with the statute.

Wherefore, Sun respectfully requests that the Commission grant this application for rehearing and accord Sun such other and further relief as appears appropriate.

Respectfully submitted,

SUN OIL COMPANY

By ROBERT E. MAY,
(Robert E. May),
Its Attorney.

MARTIN A. ROW,
LEO J. HOFFMAN.

P. O. Box 2880,
Dallas, Texas.

ROBERT E. MAY,
MAY, SHANNON and MORLEY,

1700 K Street, N.W.
Washington 6, D. C.

District of Columbia, ss:

Robert E. May, being first duly sworn, deposes and says that he is attorney for Sun Oil Company; that as such he has signed the foregoing "Application for Rehearing" for and on behalf of said Company; that he is authorized so to do; that he has read said document and is familiar with the contents thereof; and that the matters and things there-

in set forth are true and correct to the best of his information, knowledge and belief.

ROBERT E. MAY,
(Robert E. May).

[fol. 203] Subscribed and sworn to before me, a Notary Public, this 2nd day of December, 1957.

THOMAS C. EVANS,
(Thomas C. Evans),
Notary Public.

(Seal)

My Commission expires September 14, 1960.

Received Dec. 2, 10 40 AM '57.

Certificate of Service.

I hereby certify that I have this day served a copy of the foregoing document by mailing a copy thereof, properly addressed, postage prepaid, to the following:

Southern Natural Gas Company,
Watts Building,
Birmingham 2, Alabama.

Dated at Washington, D. C. this 2nd day of December, 1957.

ROBERT E. MAY,
(Robert E. May).

[fol. 204]

BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-13664.

Sun Oil Company.

Dec. 10, 1957.

Robert E. May, Esq.,

May, Shannon and Morley
1700 K Street N.W.
Washington 6, D. C.

Dear Mr. May:

Reference is made to the application submitted for filing on December 2, 1957 for rehearing of the Commission's order issued November 8, 1957 in the above-designated matter.

Your attention is invited to Section 1.30(e) of the Commission's Rules of Practice and Procedure which provides:

No application for rehearing, provided for by the statute under which a proceeding is initiated and conducted, will be entertained by the Commission until a decision is issued and becomes final under the provisions of this section.

Your application is not addressed to a final order within the meaning of the rules and is, therefore, not acceptable for filing. It is hereby rejected and copies are returned herewith.

Very truly yours,

J. H. GUTRIDE,
Secretary.

[fol. 205] Enclosure No. 46323.

cc:

Mr. Martin A. Row
Mr. Leo J. Hoffman
P. O. Box 2880
Dallas, Texas.

cc:

OGC
RGC
OPR
Docket Section (2)
SEC
JHG:ls

12/3/57.

[fol. 206]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 5, 1959 (omitted in printing).

[fol. 207]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

Petition for Review of Orders of the Federal Power Commission

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Before Tuttle, Jones and Brown, Circuit Judges.

OPINION—April 17, 1959

JONES, Circuit Judge:

Sun Oil Company, herein called Sun, made a contract bearing date August 26, 1947, with Southern Natural Gas

Company, herein referred to as Southern, for the sale to the latter of natural gas to be produced by Sun from the Gwinville Field in Mississippi. The contract provided that it should be in effect for ten years commencing on the date of the first delivery of gas by Sun to Southern. [fol. 208] This date was September 3, 1947. The contract provisions as to price were in these terms:

> "Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price
>
> (1) of seven and one-half cents (7½¢) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof;
>
> (2) of eight cents (8¢) for each one thousand (1,000) cubic feet of gas during the second five (5) years of said term."

Immediately following the foregoing was this proviso:

> "In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; • • •."

Subsequent to the Phillips Petroleum case,[1] decided on June 7, 1954, the Federal Power Commission supplemented the provisions of the Natural Gas Act, 15 U.S.C.A. § 717 et seq., by issuing its so-called No. 174 series of orders[2] which required independent producers of natural [fol. 209] gas to file rate schedules and apply for certifi-

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[1] Phillips Petroleum Company v. Wisconsin, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, 3 P U R 3d 129.

[2] 18 C F R §§ 154.91-154.102, §§ 157.23-157.31.

cates of public convenience and necessity. Sun applied for and procured a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. It filed the contract as a rate schedule under Section 4 of the Natural Gas Act.[3]

Prior to the termination of their agreement Sun and Southern made a new agreement in 1957 which was to become effective upon the expiration of the 1947 agreement. This provided for continued deliveries of gas in the same field and with the same facilities. The contract was, for the most part, substantially the same as that which it succeeded. The primary difference was an increase from 8¢ per Mcf to 20¢ per Mcf of gas. Sun then applied, under the new contract, for a new certificate of public convenience and necessity and filed the new contract as an initial rate schedule. The Commission rejected the application and filing on the ground that, the same service being involved, any new certificate would merely duplicate the earlier certificate which was still effective and outstanding and the proposed rate filings were of rate changes rather than initial rate filings. Protesting the Commission's order and reserving its right to contest it, Sun resubmitted the 1957 contract as a rate change. The Commission then, as is authorized by Section 4 of the Act, suspended the effectiveness of the rate change for the statutory period of five months. At the expiration of the five-month period the 20¢ rate was placed in effect and Sun undertook to make such refunds as might be required. Sun has petitioned this Court to [fol. 210] review the order of the Commission rejecting the application for a certificate and an initial rate filing, and the order suspending the rate change. Although a number of specifications of error are made, most of them are hinged upon the proposition that the rate set forth in the new contract was an initial rate filing, and the collateral doctrine that the certificate of public convenience and necessity which was originally issued had expired and become functus officio upon the date fixed for the expiration of the first contract by its terms.

[3] 15 U.S.C.A. § 717 c.

It is "rates and charges" that are subject to regulation.[4] The method of filing and regulating rates has thus been succinctly stated.

> "The act requires natural gas companies to file all rates and contracts with the Commission (§4(c)) and authorizes the Commission to modify any rate or contract which it determines to be 'unjust, unreasonable, unduly discriminatory or preferential' (§5(a)). Changes to previously filed rates or contracts must be filed with the Commission at least 30 days before they are to go into effect (§ 4(d)), and, except in the case of industrial rates, the Commission may suspend the operation of a new rate pending a determination of its reasonableness. (§4(e)). If a decision has not been reached before the period of suspension expires, a maximum of five months, the filed rate must be allowed to go into effect, but the Commission's order may be made retroactive to that date." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, 12 P U R 3d 112.

[fol. 211] In the Mobile case United was obligated by contract to furnish gas to Mobile at a fixed rate during the contract period of ten years. There was no provision for any different rate nor was there any provision made for changing the rate during the contract term. United undertook to effect a rate increase by filing a new rate schedule with the Commission. It was held that the Natural Gas Act gave no power to put unilateral rate increases into effect, and that United could procure a rate increase, if at all, only by an order of the Commission entered in a proceeding under Section 5 of the Act.

It is urged that the decision in Mobile recognizes a freedom of contract in rate making applicable alike to new contracts and to renewal contracts. The "philosophy of Mobile", as it is referred to, is such as to require, it is contended, a holding that when a contract has, by the

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[4] Natural Gas Act § 4(a), 15 U.S.C.A. § 717c (a).

law of contracts, terminated, the parties are permitted to fix rates for the continued service, free from Section 4 regulation, in the same manner that might have been done before the passage of the Act. We do not think the doctrine of Mobile applies in a situation such as is before us here. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103, 79 S. Ct. ——, 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, —— S. Ct. ——, 3 L. Ed. 2d 350, it was held that Section 4 procedures were available where rate increases were proposed pursuant to a "going rate" provision in the contract. The purpose of Congress was carried out in framing its regulatory scheme "not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, * * * [fol. 212] (subject of course to any overriding authority of the Commission), but also by providing in Section 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate review." 358 U. S. 114.

The same doctrine has been applied where the contract contained a "favored nation" clause and it has been held that rate increases under such a clause are subject to Section 4 of the Act. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5th Cir., 1947, 162 F. 2d 388, 71 P U R N S 182, cert. den. 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355. So too it has been held that rate increases pursuant to the escalator clause of a contract which predated the Phillips decision of June 7, 1954, were rate changes subject to Section 4 of the Act and not initial rates subject to Commission review only under Section 5 of the Act. *Bel Oil Corporation* v. *Federal Power Commission*, 5th Cir., 1958, 255 F. 2d 548, 24 P U R 3d 512, cert. den. 358 U. S. 804, —— S. Ct. ——, 3 L. Ed. 2d 76. It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by

the new contract is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5.

[fol. 213] The foregoing disposes of the principal question presented. Other questions remain. The Petitioner contends that since its certificate originally issued authorized the sale by it of natural gas "as more fully described in the application and exhibits", and since the certificate was issued under an order providing that the certificate "shall be effective only so long as the Applicant continues the acts or operations hereby authorized," it must follow that the certificate expired with the contract and the rejection by the Commission of the application for a new certificate was invalid. This contention is based upon a misconception of the purpose and effect of the certificate. The authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act and regulation pursuant thereto by the Commission. The Commission has the power under Sections 7(e) and 7 (e) of the Act, 15 U.S.C.A. § 717 f (e), (e), to issue certificate of public convenience and necessity of limited duration. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794, 18 P U R 3d 320. Whether, in this case, the Commission could have granted a certificate limited to the life of the contract, without abusing its discretion, need not be decided. We find nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor do we find anything to indicate that the Commission intended to limit its certificate. The matters to which the Petitioner points do not permit of the inference which it would have us draw.

[fol. 214] The Petitioner asserts that because of the rejection of the application for a second certificate without a hearing after notice there was a violation of the administrative requirement of Section 7(e) of the Act, 15 U.S. C.A. § 717 f (e). The Petitioner makes a like contention with respect to the rejection of its second contract as an initial rate filing. Where, as in this case, there could be no right to have a certificate of public convenience and

necessity issued which duplicated a certificate outstanding and operative; and where, as here, the second contract was a nullity as an initial rate filing, it was proper to reject them without notice and without a hearing. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, supra.*

The Commission suggests that the orders which Sun brings before us for review are interlocutory and that administrative remedies have not been exhausted. To support this view, reliance is placed upon *Shank, Trustee,* v. *Federal Power Commission,* 5th Cir. 1956, 236 F.2d 830, 15 P U R 3d 408, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324, and *Lee, Trustee,* v. *Federal Power Commission,* 5th Cir. 1956, 236 F. 2d 835, cert. den. 352 U.S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. In the cited cases the orders were mere procedural steps in the administrative process. The orders which we here review are "of a definitive character dealing with the merits of a proceeding before the Commission and, as such, are reviewable under Section 19(b) of the Act, 15 U.S.C.A. § 717 r (b). *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408, 24 P U R N S 394; *Magnolia Petroleum Co.* v. *Federal Power Commission,* 5th Cir. 1956, 236 F. 2d 785, 15 P U R 3d 364, cert. den. [fol. 215] 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. The orders were formal determinations of rights of the petitioners and the effect of the orders was not contingent upon future administrative action. We have no doubt that these orders should be passed upon by this Court.

Sun urges that its contractual relationship with Southern is only for the sale of natural gas, that it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7 (b) of the Act, 15 U.S.C.A. § 717 f (b). Our decision in *Continental Oil Company* v. *Federal Power*

Commission, —— F. 2d ——, decided this day, is controlling on this issue. A like contention was made before the Court of Appeals for the Third Circuit and its well reasoned conclusions are contrary to the position urged by Sun. *J. M. Huber Corporation* v. *Federal Power Commission*, 3rd Cir. 1956, 236 F.2d 550, 15 P U R 3d 434, cert. den. 352 U. S. 971, 77 S. Ct. 363, 1 L. Ed. 2d 324. The principles there announced are sound and are applicable here. The decision of this Court in *Deep South Oil Company of Texas* v. *Federal Power Commission*, 5th Cir. 1957, 247 F. 2d 882, 20 P U R 3d 469, is not in conflict.

It follows that the Commission's orders should be and hereby are

Affirmed.

[fol. 216]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 17049

S. W. RICHARDSON, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 17128

HUMBLE OIL & REFINING COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

[fol. 217]

No. 17136

MAGNOLIA PETROLEUM COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 17256

HUNT OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

Petitions for Review of Orders of the Federal Power Commission

Before Tuttle, Jones and Brown, Circuit Judges.

DISSENTING OPINION

BROWN, Circuit Judge, dissenting:

I am in full agreement with the Court that the orders are reviewable. I also accept, as binding on me, our prior decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F.2d 548, cert. denied 358 U.S. 804, —— S.Ct. ——, 3 L.Ed.2d 76, holding that an automatic stepped-up escalator increase is a change of rate. I do that even though that decision [fol. 218] was based primarily on our earlier one of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5 Cir., 1947, 162 F.2d 388, cert. denied 332 U.S. 770, 68 S.Ct. 82, 92 L.Ed. 355, which in turn was pronounced in the pre-*Mobile* era when all thought that contracts of a natural gas company, as in the case of any other public utility, were subject to an overriding public regulation. *Mobile* accorded almost absolute sanctity to the private contract and rejected, without so much as a deferential

footnote citation, the traditional and contrary concept of which *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 1919, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309, was the symbol as well as the *cause celebre* around which the controversy raged before the Commission and the Third Circuit. 215 F.2d 883, 886.

But in the face of *Mobile* and what it teaches, I think the Court's substantive action affirming the Commission disregards the limited nature of the jurisdiction of the Federal Power Commission, ignores the special and decisive relevance of contract terms, and does all of this without a hearing. I cannot acquiesce in this and must therefore, with deference, dissent.

I.

At the outset I think it well to point out that in realty there is but one basic question. To split it up into apparently separate issues concerning the scope of the Certificate, the change of rate in the contract, or potential abandonment of service "facilities" really only confuses. That is so because these essentially beg the question. For ex- [fol. 219] ample, if the new contract and its new price is a change of rate, then obviously, it is not an initial rate and it must be filed under Section 4(d) subject to supervision and rebate. If the "sale" is something apart from the contract which alone brought it about, so that it must continue after the contract has completely expired by its own terms, then no new Certificate is required, the original one is sufficient, and the new application should be denied. On the other hand, if the power of the Commission over the producer is limited to the "sale" reflected by the contract, then the grant of authority expired with the sales contract, so that a new Certificate would be required since all agree it is illegal to sell or transport or render service without a Certificate. Likewise, on that assumption, the old having expired, all there is is now new, and the new contract would be an initial rate subject only to §5 review and not to §4 interim suspension and rebate.

Each of these things results depending on the basic decision. But none is really a reason *why*.

I submit that a careful reading of the Court's opinion reflects that it finds no real reasons, and in the final analysis what it does, as it has done in *Continental Oil Co. v. FPC*, 5 Cir., 1959, —— F.2d —— [No. 17016], this day decided, is to arrive at its decision out of the conscientious belief that regulation is otherwise ineffectual. I would be the first to think that we could legislate interstitially, but that hardly includes engraftment or transplanting of a congenitally missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Con- [fol. 220] gress, not this Court, should be the surgeon.

II.

The Court, after pointing out that we have held that during the life of an *existing contract*, an increase in price from the operation of a most-favored-nation's clause and from an automatic stepped-up escalation clause are rate changes subject to §4 review, then sets forth as its sole reason which "disposes of the principal question presented" this language:

> "It necessarily follows that where, upon the *termination* of a *contract* fixing a rate which was the subject of an initial rate filing with the Commission, a *new contract* between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the *new contract* is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5." (emphasis supplied)

Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that "upon the *termination* of a contract" a "*new* contract between the same parties" is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*.

[fol. 221] The jurisdiction of the Commission is limited. The Act at one end excludes all that is encompassed within production and gathering and, at the other end, the distribution and sale of it to the local consumer. §1(b). It does not undertake to regulate the "business" of natural gas. "Three things and three things only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * * ." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 503, 69 S.Ct. 1251, 93 L.Ed. 1499.

As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. For "until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such sale the jurisdiction of the Commission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction." *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F.2d 61, cert. denied 355 U.S. 956, 78 S.Ct. 542, 2 L.Ed.2d 532.

The *sale* is therefore vital. It is the alpha. Can this Court be right by holding that there is no omega?

This is important especially in view of the cyclonic case by case development under the Act subjecting the owner of a gas well to the awesome obligations of an [fol. 222] orthodox utility despite the obvious " * * * fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." *Gulf Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F.2d 556.

Local distributors cannot get natural gas without transmission lines. Transmission companies cannot obtain the needed astronomical financing unless the entrepreneurs have long-term commitments by distributors to take, and by producers to supply, the gas. Despite the fact that the long-term supply contract must deal with unknown economic factors of a kind which would ordinarily permit a commodity owner to provide an ascertainable but adjust-

able formula to determine price, we have held that such agreed adjustments are rate changes. *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F.2d 548. When such increase or "rate changes" are sought, the producer must satisfy the standards prescribed by the Commission to determine whether the rate will be "just and reasonable." §4(a). *Forest Oil Co.* v. *FPC*, 5 Cir., 1959, —— F.2d —— [No. 16844]. To whatever extent any part of the producer's physical equipment serves to effectuate the sale or contain the gas at the point of sale delivery, it becomes a "facility" prohibiting abandonment of any "service" performed thereby. *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, —— F.2d —— [No. 17016].

I do not believe that Congress ever intended that the moment the first cubic centimeter of gas started its irrepressible journey from the bowels of the earth to a Brooklyn burner tip, the gas well owner had committed [fol. 223] himself and his commodity irrevocably either to the purchaser or to the life and death regulatory power of a remote agency.

III.

How was this likelihood to be avoided? Herein lies the explanation for stating the *grant* of power, and hence its *limitation*, in terms of *sale*. Power was not prescribed, as it might have been, in terms of "service," or the "furnishing," or the "supplying" of gas. What was required was a *sale*. This was a term having both an industry-gas-business relevance and a meaning readily understood by Congress. Despite the awkwardness which arises from the *Phillips* retrospective infusion of a general Congressional purpose to regulate sale by producers which the Commission and others for sixteen years thought to be nonexistent, this was as though Congress spelled out this policy: a producer need not sell for resale in interstate commerce; if he makes a sale, he will, for the duration of that sale, be subject to public utility regulation; when that sale is completed, he will then have the opportunity to reassess his position and determine whether he will cease production, sell in intrastate commerce, or make a new sale for resale in interstate commerce. In this way there was some

practical adjustment of the conceptual difficulties involved in subjecting, for the first time in the nation's history, the owner of an exhaustible natural resource to a limited regulation.

[fol. 224] IV.

I would quickly emphasize that I do not think that stating Commission jurisdiction in terms of *sale* inevitably ties jurisdiction to all of the refinements of the law of sales. But if, as this Court concludes—erroneously I think—that Congress used "production" in its everyday sense, *Continental Oil Corp.* v. *FPC*, 5 Cir., 1959, —— F.2d —— [No. 17016], then it is an understatement to say that it certainly must have had in mind the usual connotations of a word and term so well understood and so much used as "sale." In this light, it meant at least a relationship growing out of a contract. "'[S]ale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson* v. *Berry*, 1850, 49 U.S. (8 How.) 495, 544, 12 L.Ed. 1170. *Curtis* v. *O'Leary*, 8 Cir., 1942, 131 F.2d 240; 77 CJS, Sales, §1, at 575 (1952).

There are four main elements to a sale, which is to say a contract, express or implied, of sale: (1) a seller and a buyer; (2) a commodity or service; (3) a price or consideration; and (4) a quantity or time. We know for certain that the Commission cannot order an involuntary sale by a producer to a pipe line, so element (1) is fixed by the parties. The gas producer is unlike the traditional public utility whose holding out binds him to serve all on common terms. Element (2) is confined to gas with the [fol. 225] possible expansion into the area of a service facility. We likewise know for an absolute certainty from *Mobile*, that the Commission cannot prescribe the price. This, too, is left to the parties subject only to a right to review by a hearing and on evidence under §5. That takes care of element (3). On what basis, other than the insupportable one of judicial-administrative necessity can the

Commission prescribe element (4)—that is, the *amount* of the commodity to be sold, whether expressed in terms of total quantity, or quantities for a stated term?

If the *amount* of the commodity, element (4), is thought of in terms of the *quantity* to be delivered, we know for a certainty that the Commission could not order a producer to deliver *more gas* than contracted for. This is so because, whatever else may be the vagaries of the §1(b) production and gathering exclusion, the Commission lacks power to order more production. It could not, for example, compel a producer to rework a sickly well, explore a new horizon, attempt to exploit and tap a new reservoir, much less drill an additional well in order to permit, under state conservation laws, an increase in allowable production and hence deliveries to the pipe line purchaser. This prohibition is so far-reaching that the Commission even lacks the power to order an increase in *transportation* facilities because this would indirectly compel an increase in production. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 3 Cir., 1953, 204 F.2d 675. See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 504-505, 69 S.Ct. 1257, 93 L.Ed. 1499; *Colorado Interstate Gas Co.* v. *FPC*, 1945, 324 U.S. 581, 598, 65 S.Ct. 829, 89 L.Ed. 1206; *FPC* v. *Hope* [fol. 226] *Natural Gas Co.*, 1944, 320 U.S. 591, 612-615, 64 S.Ct. 281, 88 L.Ed. 333; *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 678, 74 S.Ct. 794, 98 L.Ed. 1035; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U.S. 682, 690, 67 S.Ct. 1482, 91 L.Ed. 1742.

Of course if the Commission cannot compel an increase in quantity deliverable under a contract, it may not do so by enlarging the period of *time* during which such deliveries are to be made. The result is the same. The impact is the same. In each case the Commission's order would be ineffectual unless *more* gas were produced, and this is forbidden territory to the Commission.

V.

The Supreme Court makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by deter-

mination of the Commission made after notice, hearing and order. This basic approach pervades all said and done in *Mobile*.

> "The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * * [T]he Natural Gas Act permits the relations between the parties [fol. 227] to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act, is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the act." 350 U.S. at 339, 343, 344, 345. See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 1958, —— U.S. ——, —— S.Ct. ——, 3 L.Ed.2d 153.

VI.

Both expressed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e., quantity) of the contract. Assuming that this is for us, rather than the Congress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that

the "new" contracts are substantially different. They are not, as claimed, for the same service but only at a dif-
[fol. 228] ferent price. One committing himself for two decades instead of 10 years not only to make the sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificially short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in fact but a paper transaction.

On the latter the Commission may grant a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 1956, 239 F.2d 97, reversed per curiam 353 U.S. 944, 77 S.Ct. 792, 1 L.Ed.2d 794. Conversely, it may grant them without limitation. As a condition to granting the initial Certificate, the Commission can determine whether the proffered contract is genuine and binding for a substantial period of time. If it thinks it not, it may decline the issuance of the Certificate. If, as these cases present, a "new" Certificate is requested for the "new" contract, the Commission can again look at it. Unless the proposed contract subjects the producer to substantial obligations permitting effective regulation for the future, the Commission may decline the Certificate.

All it may not do is force a producer either to produce *more* gas, or sell *more* gas, or sell *more* gas for a longer time. If that is to occur after the expiration of the initial contract, it may be done only upon application of the parties pursuant to a new agreement. The Commission [fol. 229] still has the last check since the condition for the grant of the new Certificate may be alteration in the terms of the agreement.

VII.

Finally, all of this has come about with no hearing, with no opportunity for hearing, and with an absolute refusal of the Commission even to receive the various

applications for the purpose of a hearing. Section 7(e) prescribes a hearing to determine whether a Certificate should be issued and whether, and to what extent, special conditions ought to be imposed on the grant. Section 7(c) requires that a hearing be held. Whether, and to what extent, the initial contracts were genuine, and whether, and to what extent, the "new" contracts were merely a continuation or something substantially different, involved at least questions of judgment which could not be foreclosed peremptorily by slamming the door shut before it was scarcely opened. *Northeastern Gas Transmission Co.* v. *FPC*, 3 Cir., 1952, 195 F.2d 872, cert. denied 344 U.S. 818, —— S.Ct. ——, 97 L.Ed. 637; *Mississippi River Fuel Corp.* v. *FPC*, 3 Cir., 1953, 202 F.2d 899; *Cities Service Gas Co.* v. *FPC*, 10 Cir., 1958, 255 F.2d 860. The Administrative Procedure Act, 5 USCA §§1001-1011, applicable to the Federal Power Commission, *State Corporation Commission of Kansas* v. *FPC*, 8 Cir., 1953, 206 F.2d 690, likewise assures a hearing. *Wong Yang Sung* v. *McGrath*, 1950, 339 U.S. 33, —— S.Ct. ——, 94 L.Ed. 616; *Riss & Co.* v. *United States*, W.D.Mo., 1950, 96 F.Supp. 452, rev'd, 1951, 341 U.S. 907, —— S.Ct. ——, 95 L.Ed. 1345.

[fol. 230] The peremptory nature of the Commission proceedings which we approve is dramatically demonstrated by the Court's reference to the producer's contentions under §7(b). To the argument of the producer that "it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act * * *," the Court holds "our decision in *Continental Oil Company* v. *Federal Power Commission*, —— F.2d ——, decided this day, is controlling on this issue." Accepting, for the moment, the correctness of our decision in *Continental Oil Company*, that decision deals at length with minute facts concerning a specific well which was the subject of an extensive hearing. In this proceeding, without hearing, without evidence, without knowing whether, in the sense of *Continental Oil Company*, there is any "facility" by which the service is performed, this Court proceeds to declare that the Commission could take similar action.

The joint effect of these opinions today announced is to destroy the last remnant of the §1(b) production and gathering exclusion. By forcing the owner of a natural resource to continue deliveries until the reservoir is exhausted, and to continue the delivery of gas if some piece of equipment effectuates the sale or its containment at the point of delivery, inevitably means that production is in the hands of the Commission. Congress has posted this as off limits to the Commission. Only Congress may make the change.

I therefore respectfully dissent.

[fol. 231]

IN UNITED STATES COURT OF APPEALS

No. 17040

SUN OIL COMPANY,

versus

FEDERAL POWER COMMISSION.

JUDGMENT—April 17, 1959

This cause came on to be heard on the petition of Sun Oil Company for review of orders of the Federal Power Commission issued on September 12, 1957 and November 8, 1957 in Docket Nos. G-13059 and G-13664, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

"Brown, Circuit Judge, dissenting."

[fol. 232] Petition for rehearing covering 15 pages filed May 8, 1959, omitted from this print.

It was denied, and nothing more by order June 3, 1959.

[fol. 247]

IN UNITED STATES COURT OF APPEALS

No. 17040

SUN OIL COMPANY,

versus

FEDERAL POWER COMMISSION.

ORDER DENYING REHEARING—June 3, 1959

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Brown, Circuit Judge, dissenting."

[fol. 248] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 249]

SUPREME COURT OF THE UNITED STATES

No. 321—October Term, 1959

SUN OIL COMPANY, Petitioner,

vs.

FEDERAL POWER COMMISSION.

ORDER ALLOWING CERTIORARI—November 9, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sun Oil Company, prays that a writ of certiorari be issued to review the judgment entered April 17, 1959 by the United States Court of Appeals for the Fifth Circuit (Cause No. 17,040) and the orders of the Federal Power Commission issued September 12, 1957 and November 8, 1957. The judgment affirmed the Federal Power Commission's orders issued September 12, 1957 and November 8, 1957.

OPINION BELOW

The order of the Federal Power Commission (in the form of a letter) issued September 12, 1957 (R., pp. 174-176) is not yet reported. The order of the Federal Power Commission issued November 8, 1957 (R., pp. 191-195) is reported in Volume 18 Federal Power Commission Reports (Preliminary Print) at pages 611-612. The majority and dissenting opinions of the Court of Appeals are reported in 266 F. 2d at pages 222-232 (Ad. Sheets) and are printed in Appendix A, pp. 1a-20a.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (Appendix A, p. 21a). Rehearing was denied June 3, 1959 (R., p. 247). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTION PRESENTED

(1) Does compliance with the certificate and rate filing requirements of Sections 4 and 7 of the Natural Gas Act with respect to a specific sale of natural gas pursuant to a contract of limited duration automatically constitute an unlimited commitment of the gas reserves specifically not dedicated in the contract of sale?

(2) Does the granting of an application for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act authorizing a sale described in the application which requests authority *only* to continue a sale pursuant to a contract of fixed and limited duration constitute a certificate of unlimited duration?

(3) Does a new gas sales contract relating to a new sale of gas from leases from which there has been a previously completed sale, filed as a new rate schedule, pursuant to Section 4(c) of the Natural Gas Act, constitute a change in an unrelated expired contract filed as a rate schedule and applicable to the previous, completed sale from the same field?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and Sections 4, 5, 7 and 19 of the Natural Gas Act, as amended (15 U.S.C. 717c, 717d, 717f, 717r), pertinent provisions of which are printed in Appendix B, pp. 22a-29a.

STATEMENT

Prior to this Honorable Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), Petitioner entered into a contract dated August 26, 1947 with Southern Natural Gas Company ("Southern") for the sale of gas produced from certain unitized leases in the Gwinville Field in Mississippi (R., pp. 43-70). The contract was for a term of ten years from date of first delivery, September 3, 1947, and under its terms expired September 3, 1957 (R., p. 65). In connection with the price provisions of the contract, the contract specifically provided:

> "In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of

gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *" (R., p. 62).

After this Honorable Court held the Natural Gas Act to be applicable to independent producers, Petitioner, on November 30, 1954, with jurisdictional reservations, filed the contract dated August 26, 1947 as its rate schedule, pursuant to the requirements of Section 4(c) of the Natural Gas Act (R., pp. 33, 43, 71). At the same time, Petitioner filed a request for a disclaimer of jurisdiction, or, in the alternative, an application for a certificate of public convenience and necessity with respect to the sale covered by the contract of August 26, 1947 (R., p. 35). The application recited Petitioner had undertaken a sale pursuant to a gas sales agreement being concurrently filed which was the contract of August 26, 1947 (R., p. 38). That contract was incorporated in the application by reference (R., p. 175). Petitioner requested a certificate "* * * authorizing the sale of natural gas in the circumstances above described" (R., p. 39). The Respondent accepted the contract dated August 26, 1947 as Petitioner's rate schedule (R., pp. 138-141). By an order issued May 28, 1956 (F.P.C. Docket No. G-6658), Respondent issued Petitioner a certificate of public convenience and necessity authorizing the sale of natural gas as described in the order and "* * * as more fully described in the application and exhibits in this proceeding" (R., pp. 145-161, 158).

On August 1, 1957 Petitioner entered into a new and unrelated contract with Southern for the sale of natural gas from the Gwinville Field, Mississippi. This contract was for a term of twenty years from and after September 3, 1957, the date of the expira-

tion of the contract of August 26, 1947 (R., pp. 99-132, 127). On August 13, 1957 Petitioner filed the contract of August 1, 1957 as a new rate schedule and filed a request for a disclaimer of jurisdiction, or, in the alternative, an application for a certificate of public convenience and necessity requesting authority to make the new sale contemplated by the contract of August 1, 1957 (R., pp. 162-164, 165-172).

By a letter order issued September 12, 1957, the first order reviewed by the Court of Appeals, the Commission *rejected*, without notice or opportunity for hearing, the certificate application and the new contract of August 1, 1957, filed as a rate schedule (R., pp. 174-176). The rate schedule filing was rejected without prejudice to Petitioner refiling the new contract of August 1, 1957 as a change in the rate in the contract dated August 26, 1947 and filed November 30, 1954 as a rate schedule (R., pp. 175-176). Petitioner filed a timely application for rehearing with respect to the order issued September 12, 1957, which the Commission considered as a motion for reconsideration and denied by an order issued November 8, 1957 (R., pp. 176-187, 188-190).

Petitioner, on October 10, 1957, filed under protest and reserving all rights to contest the order issued September 12, 1957, its contract dated August 1, 1957 as a change in its rate schedule consisting of its contract dated August 26, 1947 (R., pp. 133-138, 99-132). By an order issued November 8, 1957, the second order reviewed by the Court of Appeals, the Commission suspended the effectiveness of such filing as a rate change and ordered a hearing with respect to the prices set forth in the contract dated August 1, 1957 (R., pp. 192-196). Petitioner filed a timely application

for rehearing (R. 198-203). By letter dated December 10, 1957, the Secretary of the Commission rejected this application (R., pp. 204-205).

On January 6, 1958, Petitioner filed in the Court of Appeals for the Fifth Circuit a petition to review the Respondent's orders issued September 12, 1957 and November 8, 1957 (R., pp. 1-26). After a hearing, the Court on April 17, 1959, affirmed the Respondent's orders (Appendix A, pp. 1a-20a R., p. 207-231).

In its letter order issued September 12, 1957, the Commission stated that the certificate application with respect to the sale covered by Petitioner's contract dated August 1, 1957 duplicates the acreage covered by the certificate in Docket No. G-6658 and is still applicable thereto, even though the contract dated August 26, 1947 had expired (R., pp. 174-176). Thus, Respondent held that Petitioner's application for a certificate to continue the sale contemplated by the contract of August 26, 1947 and Respondent's granting a certificate for that purpose resulted in an unlimited commitment of Petitioner's gas reserves. Further, the order issued September 12, 1957 held the new contract of August 1, 1957 filed as a rate schedule (which had no effectiveness until the contract dated August 26, 1947 had expired by its own terms) duplicates the contract of August 26, 1947, and the prices in the August 1, 1957 contract embody a change in the effective rates set forth in the contract of August 26, 1947. Thus, Respondent purported to eliminate the term of the 1947 contract. All such action by Respondent was taken without notice or opportunity for hearing.

REASONS FOR GRANTING THE WRIT

I.

The Respondent's Orders Violate Section 7 of the Natural Gas Act.

In one of the early decisions construing the effect of the passage of the Natural Gas Act on contracts of natural gas companies, the Circuit Court of Appeals for the Tenth Circuit in *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F. 2d 943, 954, held that "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. * * *". This decision was affirmed by this Honorable Court in *Colorado Interstate Gas Co.* v. *F.P.C.* (1945), 324 U.S. 581. Thus, when the Natural Gas Act was held applicable to independent producers by this Court's decision in *Phillips Petroleum Company* v. *Wisconsin* (1954) 347 U. S. 672, Petitioner's contract dated August 26, 1947, was not "automatically overthrown" or extended beyond the term thereof. The Court of Appeals for the Tenth Circuit confirms this interpretation by its statement in *Cities Service Gas Co.* v. *F.P.C.*, 255 F. 2d 860, 864, cert. denied U. S. , 3 L. ed. 2d 73 (Ad. Sheets), that the "* * * [Natural Gas] Act * * * abrogates *none* of the usual contract rights except for the reviewing powers granted the Commission upon hearing."[1] The term (duration) of a gas sales agreement is one of the usual provisions and conditions of the agreement and is a very important one. The Commission's orders purport to abrogate that term.

At the date of this Court's *Phillips* decision, *supra*. Petitioner had undertaken only to make the sale con-

[1] Emphasis indicated by italics is supplied unless otherwise indicated.

templated by the contract of August 26, 1947. The *contract terms* quoted above related only to the sale of quantities of gas for a fixed term and *specifically do not dedicate* acreage or leases. Under the law of contracts, that sale was completed on September 3, 1957. Under the plain language of Section 7(c) of the Natural Gas Act, an applicant for a certificate of public convenience and necessity initially proposing a sale subject to the jurisdiction of Respondent clearly has the right to propose the terms and conditions of that sale including the price and duration. This is made abundantly clear by this Court's recent decision in *Atlantic Refining Co.* v. *Public Serv. Comm.* U. S. (Nos. 518 and 536, October Term, 1958), 3 L. ed. 2d 1312, 1318, (Ad. Sheets), by this Court's statement that "* * * Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases * * *." When a sale has been undertaken prior to the date the Natural Gas Act was construed as applicable to independent producers, it is also clear that Petitioner need only seek certificate authority to complete that sale.

As set forth in the Statement herein, Petitioner only sought in the initial certificate application authority to continue the sale undertaken by the contract of August 26, 1947. Under Section 7(e) of the Act, Respondent is required to issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *" upon the applicant making the requisite statutory showings including ability to do the acts proposed. Except for the authority in that section to attach conditions, there is no provision in Section 7 of the Act which authorizes

the Commission to amend or alter the proposal set forth in the certificate application. Respondent's order of May 28, 1956 issuing the certificate does not purport to extend the sale beyond the proposal in the application, namely the sale undertaken by the contract of August 26, 1947, and terminating on September 3, 1957, with the expiration of the contract (R., pp. 145-161, 158). As of the date Petitioner filed its initial certificate application, November 30, 1954, or as of the date of the hearing thereon, May 21, 1956, Petitioner did not and could not show ability to continue the sale beyond September 3, 1957, the date the contract of August 26, 1947 expired by its own terms. The contract of August 1, 1957 was not then in existence, and Petitioner had no purchaser for gas produced after September 3, 1957.

Under the foregoing circumstances, Respondent's order issued September 12, 1957, is a holding that the filing of a certificate application to continue a sale pursuant to contract of fixed and limited duration and in which there is no dedication of leases or gas reserves, and the granting of the application without conditions as to term constitutes an unlimited commitment to the interstate market of the gas recoverable under the leases. Such holding clearly exceeds Respondent's authority as Respondent only has authority to issue the certificate for the term sought by Petitioner or to condition the grant on Petitioner's accepting a certificate of unlimited duration.

Respondent has attempted to justify its action throughout these proceedings on the premise that Petitioner must obtain Respondent's approval under Section 7(b) of the Act to cease deliveries pursuant to the contract of August 26, 1947. This Court's decision

in *Atlantic Refining Co.* v. *Public Serv. Comm., supra.*, it is respectfully submitted, shows the fallacy of Respondent's contention. This decision pointed out that "* * * Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so *dedicated* there can be no withdrawal of *that* supply from continued interstate movement without Commission approval * * *". (3 L. ed. 2d at 1319, Ad. Sheets). The crucial question is what did Petitioner dedicate? As the contract of August 26, 1947 clearly discloses, Petitioner only agreed to sell specific volumes of gas for a fixed period. The contract specifically provided there is no dedication of gas reserves or gas. Petitioner's certificate application and the Commission's order of May 28, 1956 issuing the certificate did not purport in any way to vary *that* agreement. Such application and order merely sought and authorized certificate authority to fulfill the commitment to sell specific quantities of gas. Petitioner fulfilled that obligation and commitment on September 3, 1957. Ceasing deliveries after that date could not be an abandonment. In fact, Petitioner lacked certificate authority as of that date to make deliveries under the contract of August 1, 1957. Respondent's orders erroneously seek to extend the ten-year commitment in the contract of August 26, 1947 for the productive life of the leases involved.

II.

The Respondent's Orders Violate Section 4 of the Natural Gas Act.

Petitioner filed the August 26, 1947 contract as its rate schedule pursuant to the requirements of Section 4(c) of the Natural Gas Act. The contract contained all the prices and terms of the sale contem-

plated thereby. One of the terms and conditions of the sale as set forth therein was that it continued for ten years from the date of the initial delivery, September 3, 1947, or to September 3, 1957. As set forth in the preceding section, this Court's holding in *Phillips Petroleum Company* v. *Wisconsin, supra.*, did not abrogate any terms of this contract. The filing of the contract as a rate schedule did not alter in any way the terms of the contract. This Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 342, 343 that the rate filing" * * * requirements [of the Natural Gas Act] are no more than are necessary to implement §§ 4(c) and 5(a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions * * *" and, in short, the Act "* * * provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates." (Emphasis not added.) While the foregoing statements related to the rate terms of sales contracts filed as rate schedules, the statements would also appear applicable to other contract terms, including the term (duration) of the contract. Respondent took no action with respect to the term of the contract as a rate schedule during the effective term thereof, and the contract, as such, and as a rate schedule expired and had no force and effect on September 3, 1957. After a contract becomes effective as a rate schedule, Respondent's only authority to change the provisions thereof is Section 5(a) of the Act. The record is clear that Respondent did not purport to take any action under Section 5(a) with respect to the provisions of the contract. Additionally, as set forth in the preceding section hereof, Respondent did not purport to condition Petitioner's certificate to

continuing the deliveries beyond the date the contract expired.

There can be no doubt that the new contract dated August 1, 1957, but effective after the expiration of the August 26, 1947 contract, did not and could not affect the term of the August 26, 1947 contract. Under Respondent's holding that the contract rate schedule of August 1, 1957 is a change in the contract rate schedule of August 26, 1947, Respondent has decided either that the filing of such contract as a rate schedule automatically extends the term of the contract, contrary to this Court's decision in the *Mobile* case *supra*., or Respondent has purported to extend the term thereof, which it cannot do without according Petitioner a hearing and making the requisite statutory findings, supported by substantial evidence. Respondent did not take this action.

The Court of Appeals in sustaining Respondent's order, appears to have adopted the theory that the filing of the contract as a rate schedule continued its effectiveness, as it held that "* * * upon the *termination* of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change * * *." (266 F. 2d at 225). As the facts of record disclose and as pointed out by Judge Brown's dissenting opinion (266 F. 2d at 231), the contract of August 1, 1957 was not for a new service. In fact, neither contract provided for a service. They provided for the sale and delivery of quantities of gas for specified periods (R., pp. 43-44, 62, 101-102). The Court of Appeals for the Fifth Circuit pointed out

in *Gulf Oil Corporation* v. *F.P.C.*, 255 F. 2d 556, 557 that "* * * producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." In his dissent, Judge Brown stated: "As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale * * *" (266 F. 2d at 228, emphasis not added). Even the majority's opinion recognizes the termination (and completion) of the contract of August 26, 1947. To hold under the circumstances that the August 1, 1957 contract results in a change in the August 26, 1947 contract, as a contract or as a rate schedule, is, we respectfully submit, an erroneous interpretation of Section 4 of the Act and one which clearly contravenes this Court's holding as to the effect of filing contracts as rate schedules.

III.

Respondent's Orders Deprive Petitioner of Property Rights Without Due Process of Law.

Petitioner's leases in the Gwinville Field constitute valuable property rights. This Court's holding in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, at most subjected these leases to Respondent's regulatory authority *only* to the extent Petitioner had undertaken to sell natural gas for resale in interstate commerce therefrom as of the date of that decision. As of that date, Petitioner retained all other rights to make disposition of additional gas from such leases, subject to Respondent's regulatory authority with respect to any future sales. When Petitioner chose, as it had every right to do, to make a new and unrelated sale to Southern for resale in interstate commerce, it had every right to propose

that sale in accordance with the contract of August 1, 1957, and Petitioner was at liberty to refuse any conditioned certificate proposed by Respondent Cf. *Atlantic Refining Co.* v. *Public Serv. Comm., supra.* When, however, Petitioner proposed its second sale, Respondent, without notice and opportunity for hearing, in effect, ordered Petitioner to continue the sale without limitation as to duration to Southern in accordance with the terms of the expired August 26, 1947 contract. Respondent did, in effect, agree that the Petitioner could file the new and unrelated contract of August 1, 1957 as a change in its rate schedule consisting of the contract of August 26, 1947. When Petitioner filed its contract of August 1, 1957, Respondent suspended it for a period of five months and ordered a hearing with respect to the prices stated therein.

In addition to the substantial monetary loss Petitioner will sustain by Respondent's unauthorized action, Petitioner is denied the property right to propose the new sale negotiated by Petitioner, and to refuse to make the sale on terms which the Commission may impose in a certificate proceeding under Section 7 of the Natural Gas Act. Petitioner respectfully submits that this Court decided in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp., supra.* and *Atlantic Refining Co.* v. *Public Serv. Comm., supra.*, that Petitioner has those rights. Additionally, Respondent has in effect held that all of Petitioner's gas from leases in the Gwinville Field has been committed to a sale to Southern without limitation, contrary to the holdings of this Court in the foregoing decisions. Petitioner's contracts with Southern and all filings Petitioner has made with Respondent.

IV.

This Appeal Involves Important Legal and Other Considerations.

The questions presented are important in the administration of the Natural Gas Act and in providing at stable prices future sources of gas for ultimate public consumption. It has been the practice of producers of natural gas to sell gas pursuant to contracts of fixed duration. The duration of the sale has been an important consideration in fixing other terms of gas sales contracts, including price provisions. This practice has permitted, after the fixed period, a new sale in accordance with the economic conditions prevailing at the date of the new sale. The importance of the stabilizing effect of contractual arrangements in the regulatory scheme of the Natural Gas Act was noted by this Court in its *Mobile* decision, *supra*: "By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." (350 U. S. at 344).

If the terms of gas sales contracts are finally held ineffective, as Respondent has held in this proceeding, then Petitioner has the right, as this Court held in its *Mobile* decision, *supra*, to make *ex parte* rate filings with respect to new sources of gas under which Petitioner can "at will" file notices of changes in its rate schedules (350 U. S. at 343). Clearly, the widespread use of *ex parte* rate filings, in lieu of contracts of fixed duration, would have a material bearing on the stabilizing effect of fixed duration contracts and would raise new issues in determining the economic feasibility of pipeline proposals. According to Respondent's Thirty-fifth Annual Report to Congress, there were some 6,897 independent producer sale

schedules in effect on June 7, 1954, the date of this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672. Rate filings were made by some 2,141 independent producers during Respondent's fiscal year ending June 30, 1955 (Pp. 108-109). Petitioner believes, based on its general knowledge of the practices throughout the natural gas industry, that a very high percentage of these rate filings consists of contracts of fixed duration. Thus, the questions presented by this petition are important in the administration of the Natural Gas Act.

Judge Brown in his dissent notes that it is implicit in the Court of Appeals' opinion that that Court is apprehensive that administrative regulation will be thwarted if the parties can prescribe the term (i.e., quantity) of the contract (266 F. 2d at 231). Judge Brown points out three reasons why the Court should not be apprehensive in this regard. Additionally, it seems appropriate to point out that in certifying pipeline construction in which the adequacy of the gas supply has been an issue, the Commission's basic consideration has been the estimated volumes of gas committed to the project during the terms of the gas purchase agreements. Hence, it is apparent that gas reserves which have not been committed beyond the terms of sales contracts have had little, if any, effect to date on the availability of adequate gas reserves to justify the certification of pipeline projects.

CONCLUSIONS

Respondent's orders issued September 12, 1957 and November 8, 1957, exceed Respondent's authority under Sections 4 and 7 of the Natural Gas Act, and deprive Petitioner of his Constitutional and property

rights without due process of law. The orders will have a far-reaching effect, and in Petitioner's view, an adverse effect, in the administration of the Natural Gas Act and in making available to the ultimate consumer new sources of natural gas without the stabilizing effect of contracts of fixed duration.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 18th day of August, 1959:

J. Lee Rankin, Solicitor General
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Sun Oil Company

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY,

Petitioner,

VERSUS

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission.

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Sun Oil Company, herein called Sun, made a contract bearing date August 26, 1947, with Southern Natural Gas Company, herein referred to as Southern, for the sale to the latter of natural gas to be produced by Sun from the Gwinville Field in Mississippi. The contract provided that it should be in effect for ten years commencing on the date of the first delivery of gas by Sun to Southern. This date was September 3, 1947. The contract provisions as to price were in these terms:

"Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price

(1) of seven and one-half cents (7½¢) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof;

(2) of eight cents (8¢) for each one thousand (1,000) cubic feet of gas during the second five (5) years of said term."

Immediately following the foregoing was this proviso:

"In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *."

Subsequent to the *Phillips Petroleum* case,[1] decided on June 7, 1954, the Federal Power Commission supplemented the provisions of the Natural Gas Act, 15 U. S. C. A. § 717 *et seq.*, by issuing its so-called No. 174 series of orders[2] which required independent producers of natural gas to file rate schedules and apply for certificates of public convenience and necessity. Sun applied for and procured a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. It filed the contract as a rate schedule under Section 4 of the Natural Gas Act.[3]

Prior to the termination of their agreement Sun and Southern made a new agreement in 1957 which was to become effective upon the expiration of the 1947 agreement. This provided for continued deliveries of gas in the same field and with the same facilities. The contract was, for the most part, substantially the same as that which it succeeded. The primary difference was an increase from

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[1] *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, 3 P U R 3d 129.

[2] 18 C F R §§ 154.91-154.102, §§ 157.23-157.31.

[3] 15 U. S. C. A. § 717 c.

8¢ per Mcf to 20¢ per Mcf of gas. Sun then applied, under the new contract, for a new certificate of public convenience and necessity and filed the new contract as as initial rate schedule. The Commission rejected the application and filing on the ground that, the same service being involved, any new certificate would merely duplicate the earlier certificate which was still effective and outstanding and the proposed rate filings were of rate changes rather than initial rate filings. Protesting the Commission's order and reserving its right to contest it, Sun resubmitted the 1957 contract as a rate change. The Commission then, as is authorized by Section 4 of the Act, suspended the effectiveness of the rate change for the statutory period of five months. At the expiration of the five-month period, the 20¢ rate was placed in effect and Sun undertook to make such refunds as might be required. Sun has petitioned this Court to review the order of the Commission rejecting the application for a certificate and an initial rate filing, and the order suspending the rate change. Although a number of specifications of error are made, most of them are hinged upon the proposition that the rate set forth in the new contract was an initial rate filing, and the collateral doctrine that the certificate of public convenience and necessity which was originally issued had expired and become *functus officio* upon the date fixed for the expiration of the first contract by its terms.

It is "rates and charges" that are subject to regulation.[4] The method of filing and regulating rates has thus been succinctly stated.

> "The act requires natural gas companies to file all rates and contracts with the Commission (§ 4(c)) and authorizes the Commission to modify any rate or contract which it determines to be 'unjust, unreasonable, unduly discriminatory or preferential' (§ 5(a)). Changes to previously filed rates or contracts must

[4] Natural Gas Act § 4(a), 15 U. S. C. A. § 717c (a).

be filed with the Commission at least 30 days before they are to go into effect (§ 4(d)), and, except in the case of industrial rates, the Commission may suspend the operation of a new rate pending a determination of its reasonableness. (§ 4(e)). If a decision has not been reached before the period of suspension expires, a maximum of five months, the filed rate must be allowed to go into effect, but the Commission's order may be made retroactive to that date." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, 12 P U R 3d 112.

In the *Mobile* case United was obligated by contract to furnish gas to Mobile at a fixed rate during the contract period of ten years. There was no provision for any different rate nor was there any provision made for changing the rate during the contract term. United undertook to effect a rate increase by filing a new rate schedule with the Commission. It was held that the Natural Gas Act gave no power to put unilateral rate increases into effect, and that United could procure a rate increase, if at all, only by an order of the Commission entered in a proceeding under Section 5 of the Act.

It is urged that the decision in Mobile recognizes a freedom of contract in rate making applicable alike to new contracts and to renewal contracts. The "philosophy of Mobile", as it is referred to, is such as to require, it is contended, a holding that when a contract has, by the law of contracts, terminated, the parties are permitted to fix rates for the continued service, free from Section 4 regulation, in the same manner that might have been done before the passage of the Act. We do not think the doctrine of Mobile applies in a situation, such as is before us here. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103, 79 S. Ct. ....., 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, ... S. Ct. ....., 3 L. Ed. 2d 350, it was held that Section 4 procedures were available where rate increases were proposed pursuant

to a "going rate" provision in the contract. The purpose of Congress was carried out in framing its regulatory scheme "not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, * * * (subject of course to any overriding authority of the Commission), but also by providing in Section 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate review." 358 U. S. 114.

The same doctrine has been applied where the contract contained a "favored nation" clause and it has been held that rate increases under such a clause are subject to Section 4 of the Act. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5th Cir. 1947, 162 F. 2d 388, 71 P U R N S 182, cert. den. 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355. So too it has been held that rate increases pursuant to the escalator clause of a contract which predated the *Phillips* decision of June 7, 1954, were rate changes subject to Section 4 of the Act and not initial rates subject to Commission review only under Section 5 of the Act. *Bel Oil Corporation* v. *Federal Power Commission*, 5th Cir. 1958, 255 F. 2d 548, 24 P U R 3d 512, cert. den. 358 U. S. 804, ____ S. Ct. ____, 3 L. Ed. 2d 76. It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the new contract is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5.

The foregoing disposes of the principal question presented. Other questions remain. The Petitioner contends that since its certificate originally issued authorized

the sale by it of natural gas "as more fully described in the application and exhibits", and since the certificate was issued under an order providing that the certificate "shall be effective only so long as the Applicant continues the acts or operations hereby authorized," it must follow that the certificate expired with the contract and the rejection by the Commission of the application for a new certificate was invalid. This contention is based upon a misconception of the purpose and effect of the certificate. The authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act and regulation pursuant thereto by the Commission. The Commission has the power under Sections 7(c) and 7(e) of the Act, 15 U. S. C. A. § 717f(c), (e), to issue certificate of public convenience and necessity of limited duration. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794, 18 P U R 3d 320. Whether, in this case, the Commission could have granted a certificate limited to the life of the contract, without abusing its discretion, need not be decided. We find nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor do we find anything to indicate that the Commission intended to limit its certificate. The matters to which the Petitioner points do not permit of the inference which it would have us draw.

The Petitioner asserts that because of the rejection of the application for a second certificate without a hearing after notice there was a violation of the administrative requirement of Section 7(c) of the Act, 15 U. S. C. A. § 717f(e). The Petitioner makes a like contention with respect to the rejection of its second contract as an initial rate filing. Where, as in this case, there could be no right to have a certificate of public convenience and necessity issued which duplicated a certificate outstanding and operative; and where, as here, the second contract was a nullity as an initial rate filing, it was proper to reject them

without notice and without a hearing. *Cf. United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, supra.*

The Commission suggests that the orders which Sun brings before us for review are interlocutory and that administrative remedies have not been exhausted. To support this view reliance is placed upon *Shank, Trustee,* v. *Federal Power Commission,* 5th Cir. 1956, 236 F. 2d 830, 15 P U R 3d 408, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324, and *Lee, Trustee,* v. *Federal Power Commission,* 5th Cir. 1956, 236 F 2d 835, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. In the cited cases the orders were mere procedural steps in the administrative process. The orders which we here review are "of a definitive character dealing with the merits of a proceeding before the Commission and, as such, are reviewable under Section 19(b) of the Act, 15 U. S. C. A. § 717r(b). *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408, 24 P U R N S 394; *Magnolia Petroleum Co.* v. *Federal Power Commission,* 5th Cir. 1956, 236 F. 2d 785, 15 P U R 3d 364, cert. den. 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. The orders were formal determinations of rights of the petitioners and the effect of the orders was not contingent upon future administrative action. We have no doubt that these orders should be passed upon by this Court.

Sun urges that its contractual relationship with Southern is only for the sale of natural gas, that it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act, 15 U. S. C. A. § 717f(b). Our decision in *Continental Oil Company* v.

Federal Power Commission, ____ F. 2d ____, decided this day, is controlling on this issue. A like contention was made before the Court of Appeals for the Third Circuit and its well reasoned conclusions are contrary to the position urged by Sun. *J. M. Huber Corporation* v. *Federal Power Commission*, 3rd Cir. 1956, 236 F. 2d 550, 15 P U R 3d 434, cert. den. 352 U. S. 971, 77 S. Ct. 363, 1 L. Ed. 2d 324. The principles there announced are sound and are applicable here. The decision of this Court in *Deep South Oil Company of Texas* v. *Federal Power Commission*, 5th Cir. 1957, 247 F. 2d 882, 20 P U R 3d 469, is not in conflict.

It follows that the Commission's orders should be and hereby are

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17049

S. W. RICHARDSON, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17128

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17136

MAGNOLIA PETROLEUM COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17256

HUNT OIL COMPANY, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

I am in full agreement with the Court that the orders are reviewable. I also accept, as binding on me, our prior decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255

F. 2d 548, cert. denied 358 U. S. 804, S. Ct. , 3 L. Ed. 2d 76, holding that an automatic stepped-up escalator increase is a change of rate. I do that even though that decision was based primarily on our earlier one of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5 Cir., 1947, 162 F. 2d 388, cert. denied 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355, which in turn was pronounced in the pre-*Mobile* era when all thought that contracts of a natural gas company, as in the case of any other public utility, were subject to an overriding public regulation. *Mobile* accorded almost absolute sanctity to the private contract and rejected, without so much as a deferential footnote citation, the traditional and contrary concept of which *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 1919, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, was the symbol as well as the *cause celebre* around which the controversy raged before the Commission and the Third Circuit. 215 F. 2d 883, 886.

But in the face of *Mobile* and what it teaches, I think the Court's substantive action affirming the Commission disregards the limited nature of the jurisdiction of the Federal Power Commission, ignores the special and decisive relevance of contract terms, and does all of this without a hearing. I cannot acquiesce in this and must therefore, with deference, dissent.

I.

At the outset I think it well to point out that in reality there is but one basic question. To split it up into apparently separate issues concerning the scope of the Certificate, the change of rate in the contract, or potential abandonment of service "facilities" really only confuses. That is so because these essentially beg the question. For example, if the new contract and its new price is a change of rate, then obviously, it is not an initial rate and it must be filed under Section 4(d) subject to supervision and rebate. If the "sale" is something apart from the

contract which alone brought it about, so that it must continue after the contract has completely expired by its own terms, then no new Certificate is required, the original one is sufficient, and the new application should be denied. On the other hand, if the power of the Commission over the producer is limited to the "sale" reflected by the contract, then the grant of authority expired with the sales contract, so that a new Certificate would be required since all agree it is illegal to sell or transport or render service without a Certificate. Likewise, on that assumption, the old having expired, all there is is now new, and the new contract would be an initial rate subject only to § 5 review and not to § 4 interim suspension and rebate.

Each of these things results depending on the basic decision. But none is really a reason *why*.

I submit that a careful reading of the Court's opinion reflects that it finds no real reasons, and in the final analysis what it does, as it has done in *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, F. 2d [No. 17016], this day decided, is to arrive at its decision out of the conscientious belief that regulation is otherwise ineffectual. I would be the first to think that we could legislate interstitially, but that hardly includes engraftment or transplanting of a congenitally missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon.

II.

The Court, after pointing out that we have held that during the life of an *existing contract*, an increase in price from the operation of a most-favored-nation's clause and from an automatic stepped-up escalation clause are rate changes subject to § 4 review, then sets forth as its sole reason which "disposes of the principal question presented" this language:

> "It necessarily follows that where, upon the *termination* of a *contract* fixing a rate which was the sub-

ject of an initial rate filing with the Commission, a *new contract* between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the *new contract* is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5." (emphasis supplied)

Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that "upon the *termination* of a contract" a "*new* contract between the same parties" is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*.

The jurisdiction of the Commission is limited. The act at one end excludes all that is encompassed within production and gathering and, at the other end, the distribution and sale of it to the local consumer. § 1(b). It does not undertake to regulate the "business" of natural gas. "Three things and three things only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U. S. 498, 503, 69 S. Ct. 1251, 93 L. Ed. 1499.

As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. For "until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such sale the jurisdiction of the Commission applies but only because

of the sale and only to the extent that the Natural Gas Act confers jurisdiction." *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F. 2d 61, cert. denied 355 U. S. 956, 78 S. Ct. 542, 2 L. Ed. 2d 532.

The *sale* is therefore vital. It is the alpha. Can this Court be right by holding that there is no omega?

This is important especially in view of the cyclonic case by case development under the Act subjecting the owner of a gas well to the awesome obligations of an orthodox utility despite the obvious "* * * fact that procedures are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." *Gulf Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 556.

Local distributors cannot get natural gas without transmission lines. Transmission companies cannot obtain the needed astronomical financing unless the entrepreneurs have long-term commitments by distributors to take, and by producers to supply, the gas. Despite the fact that the long-term supply contract must deal with unknown economic factors of a kind which would ordinarily permit a commodity owner to provide an ascertainable but adjustable formula to determine price, we have held that such agreed adjustments are rate changes. *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 548. When such increase or "rate changes" are sought, the producer must satisfy the standards prescribed by the Commission to determine whether the rate will be "just and reasonable." § 4(a). *Forest Oil Co.* v. *FPC*, 5 Cir., 1959, ____ F. 2d ____ [No. 16844]. To whatever extent any part of the producer's physical equipment serves to effectuate the sale or contain the gas at the point of sale delivery, it becomes a "facility" prohibiting abandonment of any "service" performed thereby. *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, ____ F. 2d ____ [No. 17016].

I do not believe that Congress ever intended that the moment the first cubic centimeter of gas started its irrepressible journey from the bowels of the earth to a Brooklyn burner tip, the gas well owner had committed himself and his commodity irrevocably either to the purchaser or to the life and death regulatory power of a remote agency.

III.

How was this likelihood to be avoided? Herein lies the explanation for stating the *grant* of power, and hence its *limitation*, in terms of *sale*. Power was not prescribed, as it might have been, in terms of "service," or the "furnishing," or the "supplying" of gas. What was required was a *sale*. This was a term having both an industry-gas-business relevance and a meaning readily understood by Congress. Despite the awkwardness which arises from the *Phillips* retrospective infusion of a general Congressional purpose to regulate sale by producers which the Commission and others for sixteen years thought to be nonexistent, this was as though Congress spelled out this policy: a producer need not sell for resale in interstate commerce; if he makes a sale, he will, for the duration of that sale, be subject to public utility regulation; when that sale is completed, he will then have the opportunity to reassess his position and determine whether he will cease production, sell in intrastate commerce, or make a new sale for resale in interstate commerce. In this way there was some practical adjustment of the conceptual difficulties involved in subjecting, for the first time in the nation's history, the owner of an exhaustible natural resource to a limited regulation.

IV.

I would quickly emphasize that I do not think that stating Commission jurisdiction in terms of *sale* inevitably ties jurisdiction to all of the refinements of the law of sales. But if, as this Court concludes—erroneously I think

—that Congress used "production" in its everyday sense, *Continental Oil Corp.* v. *FPC*, 5 Cir., 1959, F. 2d , [No. 17016], then it is an understatement to say that it certainly must have had in mind the usual connotations of a word and term so well understood and so much used as "sale." In this light, it meant at least a relationship growing out of a contract. "'[S]ale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson* v. *Berry*, 1850, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170. *Curtis* v. *O'Leary*, 8 Cir., 1942, 131 F. 2d 240; 77 CJS, Sales, § 1, at 575 (1952).

There are four main elements to a sale, which is to say a contract, express or implied, of sale: (1) a seller and a buyer; (2) a commodity or service; (3) a price or consideration; and (4) a quantity or time. We know for certain that the Commission cannot order an involuntary sale by a producer to a pipe line, so element (1) is fixed by the parties. The gas producer is unlike the traditional public utility whose holding out binds him to serve all on common terms. Element (2) is confined to gas with the possible expansion into the area of a service facility. We likewise know for an absolute certainty from *Mobile*, that the Commission cannot prescribe the price. This, too, is left to the parties subject only to a right to review by a hearing and on evidence under § 5. That takes care of element (3). On what basis, other than the insupportable one of judicial-administrative necessity can the Commission prescribe element (4)—that is, the *amount* of the commodity to be sold, whether expressed in terms of total quantity, or quantities for a stated term?

If the *amount* of the commodity, element (4), is thought of in terms of the *quantity* to be delivered, we know for a certainty that the Commission could not order a producer to deliver *more gas* than contracted for. This is

so because, whatever else may be the vagaries of the § 1(b) production and gathering exclusion, the Commission lacks power to order more production. It could not, for example, compel a producer to rework a sickly well, explore a new horizon, attempt to exploit and tap a new reservoir, much less drill an additional well in order to permit, under state conservation laws, an increase in allowable production and hence deliveries to the pipe line purchaser. This prohibition is so far-reaching that the Commission even lacks the power to order an increase in *transportation* facilities because this would indirectly compel an increase in production. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 3 Cir., 1953, 204 F. 2d 675. See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U. S. 498, 504-505, 69 S. Ct. 1257, 93 L. Ed. 1499; *Colorado Interstate Gas Co.* v. *FPC*, 1945, 324 U. S. 581, 598, 65 S. Ct. 829, 89 L. Ed. 1206; *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U. S. 591, 612-615, 64 S. Ct. 281, 88 L. Ed. 333; *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U. S. 672, 678, 74 S. Ct. 794; 98 L. Ed. 1035; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U. S. 682, 690, 67 S. Ct. 1482, 91 L. Ed. 1742.

Of course if the Commission cannot compel an increase in quantity deliverable under a contract, it may not do so by enlarging the period of *time* during which such deliveries are to be made. The result is the same. The impact is the same. In each case the Commission's order would be ineffectual unless *more* gas were produced, and this is forbidden territory to the Commission.

V.

The Supreme Court makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by determination of the Commission made after notice, hearing and order. This basic approach pervades all said and done in *Mobile*.

"The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * * [T]he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act, is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the act." 350 U. S. at 339, 343, 344, 345. See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 1958, ... U. S. ....., ... S. Ct. ..... 3 L. Ed. 2d 153.

VI.

Both expressed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e., quantity) of the contract. Assuming that this is for us, rather than the Congress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that the "new" contracts are substantially different. They are not, as claimed, for the same service but only at a different price. One committing himself for two decades instead of 10 years not only to make the

sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificially short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in fact but a paper transaction.

On the latter the Commission may grant a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 1956, 239 F. 2d 97, reversed per curiam 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794. Conversely, it may grant them without limitation. As a condition to granting the initial Certificate, the Commission can determine whether the proffered contract is genuine and binding for a substantial period of time. If it thinks it not, it may decline the issuance of the Certificate. If, as these cases present, a "new" Certificate is requested for the "new" contract, the Commission can again look at it. Unless the proposed contract subjects the producer to substantial obligations permitting effective regulation for the future, the Commission may decline the Certificate.

All it may not do is force a producer either to produce *more* gas, or sell *more* gas, or sell *more* gas for a longer time. If that is to occur after the expiration of the initial contract, it may be done only upon application of the parties pursuant to a new agreement. The Commission still has the last check since the condition for the grant of the new Certificate may be alteration in the terms of the agreement.

VII.

Finally, all of this has come about with no hearing, with no opportunity for hearing, and with an absolute refusal of the Commission even to receive the various applications for the purpose of a hearing. Section 7(e)

prescribes a hearing to determine whether a Certificate should be issued and whether, and to what extent, special conditions ought to be imposed on the grant. Section 7(e) requires that a hearing be held. Whether, and to what extent, the initial contracts were genuine, and whether, and to what extent, the "new" contracts were merely a continuation or something substantially different, involved at least questions of judgment which could not be foreclosed peremptorily by slamming the door shut before it was scarcely opened. *Northeastern Gas Transmission Co.* v. *FPC*, 3 Cir., 1952, 195 F. 2d 872, cert. denied 344 U. S. 818, ... S. Ct. ....., 97 L. Ed. 637; *Mississippi River Fuel Corp.* v. *FPC*, 3 Cir., 1953, 202 F. 2d 899; *Cities Service Gas Co.* v. *FPC*, 10 Cir., 1958, 255 F. 2d 860. The Administrative Procedure Act, 5 USCA §§ 1001-1011, applicable to the Federal Power Commission, *State Corporation Commission of Kansas* v. *FPC*, 8 Cir., 1953, 206 F. 2d 690, likewise assures a hearing. *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, ... S. Ct. ....., 94 L. Ed. 616; *Riss & Co.* v. *United States*, W. D. Mo., 1950, 96 F. Supp. 452, rev'd, 1951, 341 U. S. 907, ... S. Ct. ....., 95 L. Ed. 1345.

The peremptory nature of the Commission proceedings which we approve is dramatically demonstrated by the Court's reference to the producer's contentions under § 7(b). To the argument of the producer that "it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act * * *," the Court holds "our decision in *Continental Oil Company* v. *Federal Power Commission*, ... F. 2d ....., decided this day, is controlling on this issue." Accepting, for the moment, the correctness of our decision in *Continental Oil Company*, that decision deals at length with minute facts concerning a specific well which was the subject of an extensive hearing. In this proceeding, without hearing, without evidence, without knowing whether, in the sense of *Con-*

tinental Oil Company, there is any "facility" by which the service is performed, this Court proceeds to declare that the Commission could take similar action.

The joint effect of these opinions today announced is to destroy the last remnant of the § 1(b) production and gathering exclusion. By forcing the owner of a natural resource to continue deliveries until the reservoir is exhausted, and to continue the delivery of gas if some piece of equipment effectuates the sale or its containment at the point of delivery, inevitably means that production is in the hands of the Commission. Congress has posted this as off limits to the Commission. Only Congress may make the change.

I therefore respectfully dissent.

A true copy
Test: [s] Eward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Aug 3, 1959

Judgment

Extract from the Minutes of April 17, 1959.

No. 17040.

SUN OIL COMPANY,

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Sun Oil Company for review of orders of the Federal Power Commission issued on September 12, 1957 and November 8, 1957 in Docket Nos. G-13059 and G-13664, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

"BROWN, Circuit Judge, dissenting."

APPENDIX B

Excerpts from the Constitution of the United States Amendment V—Capital Crimes; Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4.

* * * * * * * * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty

days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification,

or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c.]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-

gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7.

* * * * * * * * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f(b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale

[1] Subsection 7(c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)] [2]

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[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized

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any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

[4] Subsection 7(e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

* * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19.

* * * * * * * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States [8] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

[8] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * * * * * * *

[redacted]

BRIEF FOR THE FEDERAL

PUBLIC DEFENDER IN

[illegible]SITION

In the Supreme Court of the United States

October Term, 1959

No. 321

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The letter order of the Federal Power Commission, dated September 12, 1957 (R. 174-176), is not reported. The Commission's orders, issued November 8, 1957 (R. 188-191, 192-195), are reported at 18 F.P.C. 609 and 611. The opinions of the Court of Appeals for the Fifth Circuit (Pet. App. 1a-20a) are reported at 266 F.2d 222.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (Pet. App. 21a). A petition for rehearing, timely filed, was denied on June 3, 1959. The petition for a writ of certiorari was filed on August 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

A producer of natural gas was granted by the Federal Power Commission a certificate of public convenience and necessity to supply gas to an interstate pipeline, and to operate facilities for that sale, without any condition limiting the certificate to the term of his contract with the pipeline (10 years). The producer also filed the contract as its rate schedule pursuant to the Commission's rules. The questions presented are:

1. Does the expiration of the contract terminate the producer's certificate and obligation to supply gas to the pipeline?

2. Does the producer's subsequent execution of a new contract with the same pipeline for the same gas supply for a further period of years, but at a higher price, constitute a different "operation, sale, [or] service" for which a new certificate should be issued and an initial rate-filing made; or is the new higher rate a "change" in rate which is subject to a hearing under, and the procedures of, Section 4 of the Natural Gas Act?

3. In these circumstances, may the Commission without hearing reject the producer's application for a new certificate where it permits the producer to file its new contract as a "change" in rate for the sale covered by the previously issued certificate? [1]

STATUTES INVOLVED

The applicable provisions of the Natural Gas Act are set forth in petitioner's appendix at pp. 22a-29a.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas from certain unitized leases in the Gwinville Gas Field in Mississippi to Southern Natural Gas Company. The sale was commenced under a contract entered into in August 1947 for a term of ten years from the date of first delivery (Pet. App. 1a). The contract price was 7½¢ per Mcf for the first 5 years, and 8¢ for the next five (Pet. App. 1a-2a).

In November 1954, petitioner filed the contract with the Federal Power Commission as its FPC Gas Rate Schedule No. 55 (R. 35, 43), pursuant to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the Commission's No. 174 series of orders (18 C.F.R. (1958 Cum. Supp.) 154.91, *et seq.*) implementing that decision. On May 28, 1956, the

[1] If certiorari should be granted, we reserve the right also to argue, as we did in the court below, that petitioner was not entitled to immediate review of the order of the Commission setting for hearing and suspending the rate schedules which had been filed as rate changes because that order was procedural and interlocutory.

Commission issued a certificate of public convenience and necessity authorizing the sale of natural gas to Southern (R. 145, Pet. App. 2a).

On August 13, 1957, petitioner filed a certificate application seeking authorization for service to Southern based on a new contract, dated August 1, 1957, which was to be effective on the expiration date of its existing agreement (R. 165, Pet. App. 2a) and at the same time tendered the new contract for filing as an "initial" rate schedule (R. 163). This new contract merely continued the service already supplied to Southern from the same field and reservoirs, but at the rate of 20¢ per Mcf (Pet. App. 2a-3a). Petitioner did not apply for approval of abandonment of the sale under Section 7(b) of the Natural Gas Act at any time.

The Commission rejected the application and the proffered filing on September 12, 1957, because, as its letter to petitioner explained, the certificate would have duplicated the previously issued and still effective certificate and the rate schedule would have increased petitioner's existing rate and should have been filed as a rate change under Section 4(d) of the Act (Pet. App. 3a, R. 174).

Thereafter, petitioner applied for rehearing and at the same time filed its new contract under protest as a rate change (R. 133-134). On November 8, 1957, the Commission denied reconsideration, reiterating its previous explanation (R. 188). The proposed rate change was suspended and set for hearing the same day (R. 192). Petitioner's timely application for a rehearing with respect to the hearing and suspension

order was also rejected by the Commission (R. 198, 204).

The court below, with Judge Brown dissenting, affirmed the Commission's orders in all respects. It held that, where a new contract is made between the same parties for the same service as provided by a terminated contract but at a higher rate, the new rate is a rate change, not an initial rate, and accordingly the rate provided for by the new contract is subject to the suspension provisions of Section 4 of the Act (Pet. App. 5a).

ARGUMENT

This petitioner advances essentially the same arguments made by the petitioner in *S.W. Richardson* v. *Federal Power Commission*, No. 208, this Term, seeking review of a companion decision of the court below on a record parallel to the present one. The Fifth Circuit based its decision in *Richardson* (266 F.2d 233), decided the same day, on its opinion in this case. For the reasons stated at pp. 5-10 of our brief in opposition in *Richardson*, to which we respectfully

refer the Court, we submit that this petition should likewise be denied.[2]

Respectfully submitted,

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[2] Richardson's contention that the Section 7(b) prohibition of abandonment without Commission approval does not apply to him because his sale is not made by means of facilities subject to Commission jurisdiction, which is discussed at pp. 10-12 of our brief in opposition in *Richardson*, is not involved in the present case.

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REPLY BRIEF OF
PETITIONER SUN OIL
COMPANY

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Supreme Court, U.S.
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OCT 5 1959
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

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v.

FEDERAL POWER COMMISSION, *Respondent.*

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Sun Oil Company, submits its Reply Brief to the Brief for the Federal Power Commission (Respondent) in Opposition.

PRELIMINARY STATEMENT

In its Brief in Opposition Respondent asks this Honorable Court to deny the Petition for a Writ of Certiorari for the reasons set forth in the Brief in Opposition in Cause No. 208, October Term, 1959, *S. W. Richardson,* Petitioner v. *Federal Power Commission.* Petitioner will therefore refer to that Brief.

QUESTIONS PRESENTED AND ARGUMENT

The Petition in this proceeding, in Petitioner's view, raises a more fundamental and basic question than the questions listed by Respondent (Brief in Opp., p. 2). This question is whether this Honorable Court's *Phillips* decision,[1] holding the Natural Gas Act applicable to Independent Producers, and Petitioner's compliance with Sections 4 and 7 of the Natural Gas Act, relating to a sale of natural gas for a period of fixed duration undertaken prior to the date of that decision, constitutes an unlimited dedication of gas reserves to a purchaser which had only obligated itself to purchase gas for the contract term (Pet., pp. 2, 7-14). If the orders under review are sustained, Respondent will be permitted to nullify the duration terms of gas sales agreements without compliance with statutory procedural requirements. Additionally, Respondent will be defeating by administrative action, without notice and opportunity for hearing, one of the basic purposes of the Natural Gas Act, as pointed out by this Court in its *Memphis*[2] and *Mobile*[3] decisions, namely, that the Act " * * * evinces no purpose to abrogate private contracts as such."[4] With some 6,897 contract rate schedules in effect as of June 7, 1954, of which Petitioner believes a very high percentage are of fixed duration, the basic question presented is of utmost importance to the natural gas

[1] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

[2] *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division*, —— U.S. ——, 3 L. ed. 153, 159 (Ad. Sheets).

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

[4] Ibid., 350 U.S. at 338.

industry, and the Petition, it is respectfully urged, should not be regarded as one dealing with the validity of Respondent's regulatory action with respect to isolated sales as the listed "Questions Presented" in Respondent's Brief might suggest or as Respondent argues.[5]

With respect to the certificate requirements of Sections 7(c) and 7(e) of the Natural Gas Act and Petitioner's compliance with the requirements thereof, the basic question is whether Petitioner by applying only for a certificate to complete a sale pursuant to a contract of fixed duration and being granted a certificate " * * * authorizing the sale * * * as more fully described in the application * * * " was granted certificate authority to have a term coextensive with the term of the contract or certificate authority of unlimited duration which committed without limitation, and contrary to the specific terms of the contract, Petitioner's gas reserves from the field involved (Pet. pp. 7-10; R. 38-39, 145, 157-158). Petitioner does not contend as suggested by Respondent's first question that the termination or cancellation of the contract terminates Petitioner's certificate authority. The duration of that authority, as already set forth above, is determined from the language of the certificate. Respondent's Brief in Opposition[6] makes no reference to the foregoing limiting language of the certificate, to the requirements of Section 7(e) of the Act, that upon making the requisite statutory showings, Respondent shall issue *the certificate requested*, and to Respondent's only statutory authority to alter the

[5] See Brief in Opposition, *S. W. Richardson* v. *F.P.C.*, No. 208, October Term, 1959, pp. 2, 5.

[6] Ibid., pp. 2, 6-9.

proposal in the certificate application by conditions which Respondent did not exercise as to the duration of the sale (Pet. 7-9). Moreover, as of the date the certificate was issued, Petitioner did not and could not show ability to continue the sale after the term of the initial contract as Petitioner had no purchaser for its gas (R. 145, 43-70, 99-132).

The basic question presented by Petitioner with respect to Section 4 of the Act is whether, after a contract filed as a rate schedule has expired by its own terms, is a second contract applicable to a new and wholly unrelated sale from the same field, filed as a new rate schedule, a "change" in the first contract rate schedule. Respondent's contentions that this question should be answered in the affirmative appear to be based on the assumption that the second contract continued the first sale, and that the filing of the first contract as a rate schedule automatically committed Petitioner to continue the sale indefinitely.[7] Respondent's assumption is contrary to the terms of the contracts (R. 43-70, 99-132). For the reasons set forth in the Petition, it is respectfully submitted that the filing of the first contract does not have this effect (Pet. pp. 10-13).

The cases cited[8] by Respondent clearly do not support its contentions. This Court's recital of the facts in *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, 422-3, disclose that Respondent ordered continuance of a "practice" pursuant to Section 206 of the Federal Power Act, a section substantially identical to Section 5(a) of the Natural Gas Act.

[7] Ibid., pp. 2, 4, 5, 6.

[8] Ibid., pp. 6-8.

Assuming *arguendo* Section 5(a) would be applicable to the term of a contract rate schedule, for this decision to support Respondent's contention, Respondent would have had to order, after notice and opportunity for hearing and after making requisite findings, pursuant to the authority accorded it by Section 5(a) of the Act, that the fixed term of Petitioner's contract rate schedule be changed to a term of unlimited duration. (Pet. p. 11). The *Bel Oil*,[9] *Mississippi*[10] and *Cities Service*[11] cases cited by Respondent involved changes in contract rate schedules during the effective terms thereof as contracts and rate schedules, and clearly they are not precedents for the proposition that a new and wholly unrelated contract should be considered as a change in another contract previously filed as a rate schedule after its expiration date. Under the terms of the respective contracts or their effective dates as rate schedules, the new contract could have no effectiveness during the term of the initial contract as a contract or as a rate schedule (R. 43-73, 65; 99-131, 127).

The *Huber* case,[12] in essence, involved the unwillingness of an Independent Producer to apply for, and discharge, certificate authority to continue a sale pursuant to a contract negotiated prior to this Court's *Phillips* decision, *supra*. As of the date Petitioner's

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[9] *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548, *cert. den.* 358 U.S. 804.

[10] *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388, *cert. den.* 332 U.S. 770.

[11] *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726, *cert. den.* 352 U.S. 911.

[12] *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550, *cert. den.* 352 U.S. 971.

initial contract expired, Petitioner had not only applied for a certificate to carry out its undertaking, but had discharged its obligation under the contract and the certificate, and the contract, as such, and as a rate schedule had also expired under its own terms. Similarly, as of that date, no abandonment authority was required as the "sale" for which Petitioner sought and was granted certificate authority had been completed. Here, unlike the first *Sunray case*,[13] Petitioner applied for certificate authority to complete the sale undertaken by its initial contract and was granted authority only to complete that sale.

For all the foregoing reasons and the reasons set forth in its Petition, Petitioner respectfully prays that its Petition be granted.

Respectfully submitted,

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[13] *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97 reversed in part and remanded 353 U.S. 944.

Certificate of Service

I certify that the Reply Brief of Petitioner, Sun Oil Company, was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 5th day of October, 1959.

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BRIEF OF PETITIONER

SUN OIL COMPANY

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Petitioner,

v.

FEDERAL POWER COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER, SUN OIL COMPANY

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BRIEF OF PETITIONER, SUN OIL COMPANY

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals for the Fifth Circuit (R. 146-153, 153-164) are reported at 266 F. 2d 222-232. The order of the Federal Power Commission (in the form of a letter) issued September 12, 1957 (R. 123-124) is not yet reported. The order of the Federal Power Commission issued November 8, 1957 (R. 136-137) is reported at 18 F.P.C. at pages 611-612.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (R. 164). The petition for a writ of

certiorari was filed on August 18, 1959. A writ of certiorari was granted November 9, 1959. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Does compliance with the certificate and rate filing requirements of Sections 4 and 7 of the Natural Gas Act with respect to a sale of gas of specific quantities for a specifically limited period of time, with no dedication of gas reserves involved, constitute a commitment to render a sale or service to the public forever?

2. Does an order issued under Section 7 of the Natural Gas Act authorizing a sale described in an application for certificate and granting the application, which requests authority *only* to continue a sale pursuant to a gas sales contract of specifically limited duration, constitute the certificate one of unlimited duration requiring a perpetual sale or service?

3. Does a new gas sales contract, filed as a new initial rate schedule pursuant to Section 4(c) of the Natural Gas Act, constitute a change in an unrelated expired sales contract which was previously filed as a rate schedule and under which the sale has been completed?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and Sections 1, 4, 5, 7 and 19 of the Natural Gas Act, as amended (15 U.S.C. §§ 717b, 717c, 717d, 717f, 717r), Sections 1.30 and 1.32 of the Commission's Rules of Practice and Procedure,

and Sections 154.91, *et seq.*, and 157.23, *et seq.*, of the Regulations under the Natural Gas Act, pertinent provisions of which are printed in Appendix, pp. 55-68.

STATEMENT

Statement of Facts: Some fourteen months before the Federal Power Commission (Commission) instituted its investigation on October 28, 1948,[1] of Phillips Petroleum Company to determine whether that company was subject to the Natural Gas Act, and some seven years before that investigation culminated in the Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), Sun Oil Company (Sun) on August 26, 1947, entered into a contract for the sale of natural gas produced from leasehold interests in the Gwinville Field in Mississippi to Southern Natural Gas Company (Southern Natural) (R. 32-52).

Sun and Southern Natural limited the sale to a period of years. Article XIV of the contract provided that the "* * * agreement shall remain in force and effect for a period of ten (10) years, commencing on the date on which the first delivery of gas is made by Seller [Sun] to Buyer" [Southern Natural] (R. 48).[2]

By Article XI of the contract, Sun specifically agreed to sell specified volumes of gas and Sun did not commit its gas reserves to the sale:

> "In this connection, it is understood that by this agreement Seller is not dedicating to Buyer,

[1] 347 U.S. at 675.

[2] Options were also included in the contract for an earlier termination date (*e.g.*, See Art. III (R. 34); Art. XI (R. 46); Art. XII (R. 47-48)). None of the options were exercised.

> or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *." (R. 46).

The first delivery of gas was made September 3, 1947 and the sale provided for therein was to be and was in fact completed at the end of the agreed term of 10 years from that date (R. 128).

As of August 1, 1957 Sun and Southern Natural entered into a contract for a new and different sale of natural gas from the Gwinville Field (R. 62-85). The term of this contract was for a period of twenty years "from and after September 3, 1957" (R. 82). It was the intent of the parties, as the provisions of the contract plainly show, that the new sale should commence the day after the initial sale was completed. Additionally, the terms of the two contracts differed in substantial ways, and the differences are readily apparent (R. 32-52, 62-85). The provisions for term [10 years versus 20 years (R. 48, 82)], contract quantities [20% of total line requirements versus a daily average equal to 66⅔% of deliverability of Sun's wells (R. 35, 64)], price [7½c-8c per Mcf in two steps versus 20c-23c per Mcf in four steps (R. 46, 77)], quality [natural state versus specified standards, including minimum Btu content (R. 40, 76)], delivery conditions (R. 40, 75), among others, vary substantially.[3]

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[3] Parenthetical comparisons are general and do not include all terms.

Proceedings before the Commission: After this Court's *Phillips* decision[4] the Commission promulgated its No. 174 series of orders (18 C.F.R. § 154.91, *et seq.*, § 157.23, *et seq.*). The order then in effect, No. 174-A, required every independent producer, a term defined by § 154.91 of the Commission's Regulations under the Natural Gas Act "who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission" to file with the Commission an application for a certificate of public convenience and necessity in accordance with § 157.24 through § 157.27 of such regulations and a rate schedule setting forth "the terms and conditions * * * and all rates * * * for such * * * sale effective on June 7, 1954."[5]

On November 30, 1954, Sun filed with the Commission an application for a disclaimer of jurisdiction or, in the alternative, an application for a certificate of public convenience and necessity (R. 26-31). In such application Sun recited that "Sun was, on June 7, 1954, and now is, delivering gas subject to the contract with the following Purchaser: Southern Natural Gas Company, which contract has either been heretofore filed, or is being filed contemporaneously herewith, as a rate schedule" (R. 28). The Commission found that the contract of August 26, 1947 was thereby incorporated by reference as a part of the application (R. 124). Sun also set forth therein that "This application is hereby made *only* for a certificate of public convenience and necessity authorizing *the sale* of nat-

[4] *Phillips Petroleum Company* v. *Wisconsin*; 347 U.S. 672.

[5] Order 174-A issued August 6, 1954, §§ 154.92, 157.23.

ural gas in the circumstances above described"[6] (R. 29).

On November 30, 1954 Sun filed the sales contract of August 26, 1947 and amendments thereto as its rate schedule (R. 24; 32). Thus, the terms of the contract of August 26, 1947, including the termination date and Sun's limited undertaking to deliver volumes of gas, became the terms of the rate schedule.

The Commission accepted the contract as Sun's F.P.C. Gas Rate Schedule No. 55 (R. 32; 93-95). Throughout the entire effective term of the rate schedule, the Commission took no action, under its "rate-review powers,"[7] to modify the term of the contract or the undertaking of Sun only to sell specifically limited volumes of gas for a specifically limited period. After the rate schedule expired by its own terms on September 3, 1957, the Commission took action on September 12, 1957, detailed below (R. 123-124). This action had the effect of deleting the term of the rate schedule and converting the limited undertaking to sell specific volumes of gas for a specific period to an unlimited dedication of Sun's leases and the production therefrom to a sale to Southern Natural. The authority of the Commission to take this action is one of the controverted issues in this proceeding.

On April 19, 1956, the Commission gave notice of the filing of the certificate application (21 F.R. 2706). Such notice fixed May 21, 1956 as the date for the hearing thereon, and indicated that, in the absence

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[6] Emphasis is added unless otherwise indicated.

[7] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

of opposition to the application, the Commission would dispose of it pursuant to the provisions of Sections 1.30(e)(1) or 1.30(e)(2) of the Commission's Rules of Practice and Procedure and that unless otherwise advised, it would be unnecessary for applicants to appear or be represented at the hearing [8] (21 F.R. 2707). The hearing was held on May 21, 1956, as a non-contested proceeding, and the Commission disposed of the matter upon the basis of the pleadings (Sun's application (R. 99-112).[9] Since Sun's application constituted the sole evidence as to Sun's sale, there was not one iota of evidence before the Commission to indicate that Sun was either able or willing to sell any quantities of gas, from any gas reserves, or for any period of time other than as specifically set forth in the gas sales contract of August 26, 1947.

On the basis of Sun's verified application, the Commission by order issued May 28, 1956 issued Sun a certificate (R. 99-112). The legal effect of that certificate, as well as the Commission's contention that Sun had an obligation to continue the sale of gas to Southern Natural, after the date of the expiration of the sales contract of August 26, 1947, are also controverted issues in this proceeding.

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[8] In part, the Notice provided: "*Provided, however*, That the Commission may, after a non-contested hearing, dispose of the proceedings pursuant to the provisions of Section 1.30(e)(1) or (e)(2) of the Commission's Rules of Practice and Procedure. Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or be represented at the hearing."

[9] In a proceeding of this type the matter is disposed of upon consideration of the pleadings. Section 1.32(b) of the Rules of Practice and Procedure.

As of the date the Commission issued to Sun the certificate described in the preceding paragraph the new contract between Sun and Southern Natural dated August 1, 1957 was not in existence. After that contract was executed, Sun on August 13, 1957 filed an application for disclaimer of jurisdiction, or in the alternative, and application for a certificate of public convenience and necessity. In this application Sun sought authority, alternatively, to sell and deliver gas under the terms of the second contract dated August 1, 1957 (R. 115-121). By this application, Sun sought to commence a new and different sale to Southern Natural "from and after September 3, 1957." At the same time, on August 13, 1957, Sun filed its new contract of August 1, 1957, but not effective by its own terms until "from and after September 3, 1957," as a rate schedule applicable to the sale proposed by the certificate application filed on the same date (R. 82; 113-115).[10]

By the letter order issued September 12, 1957, the first order reviewed by the Court of Appeals, the Commission *rejected*, without notice and opportunity for hearing, the certificate application and the contract of August 1, 1957, filed as a rate schedule (R. 123-124). The Commission's rejection of the rate schedule filing was without prejudice to Petitioner's refiling the contract of August 1, 1957 as a *change* in the first rate schedule, consisting of the contract of August 26, 1947. The latter contract had expired and had no force and

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[10] The Commission, in rejecting this filing (R. 123-124), returned all copies of the contract to Sun (R. 123-124). The filing date shown on the contract at page 61 of the record is the date such contract was filed, under protest and reserving all rights, to contest the order of September 12, 1957, as a "notice of change."

effect the day before the contract of August 1, 1957 became effective by the terms thereof (R. 82, 124).

In the letter order of September 12, 1957, the Commission stated that the certificate application filed August 13, 1957, requesting authority to make the sale contemplated by the contract of August 1, 1957, duplicates the acreage covered by the certificate in Docket No. G-6658 (*i.e.*, the certificate issued May 28, 1956, with respect to the contract of August 26, 1947) and that the previously issued certificate is still applicable to gas sales from the leases involved even though the contract of August 26, 1947 has expired (R. 123-124). Thus, the Commission purported to hold that the certificate theretofore issued to Sun required that Sun render a continuous service forever, in complete disregard of the specific limitations contained in Sun's application for a certificate, in complete disregard of the specific limitations contained in the certificate itself, in complete disregard of the complete absence of evidence in the record to indicate that Sun was either able or willing to do more than it had contracted to do, and in complete disregard of Section 7(e) of the Natural Gas Act.

The order issued September 12, 1957 also held that the new contract of August 1, 1957, filed as a rate schedule (which had no effectiveness until the contract dated August 26, 1947 had expired) duplicates the sale pursuant to the earlier sales contract of August 26, 1947, and that the prices in the August 1, 1957, contract embody a change in the effective rates set forth in the earlier rate schedule consisting of the contract of August 26, 1947. Thus, the Commission purported to hold that Sun's rate schedule continued in effect thereafter, in complete disregard of the fact that it had obviously expired by its own terms.

On October 10, 1957 Sun, under protest and with a reservation of all rights to contest the order issued September 12, 1957, filed the contract dated August 1, 1957 as a change in the rate schedule consisting of the expired contract of August 26, 1947 (R. 87-89; 136). By an order issued November 8, 1957, the second order reviewed by the Court of Appeals, the Commission suspended the effectiveness of the contract as a change in rate schedule for a full five month period. Such order purports to continue all the terms of the August 26, 1947 gas sales contract in effect, subject to Sun's right to place the new rates and other provisions in effect pursuant to the provisions of Section 4(e) of the Act, and ordered a hearing with respect thereto under the provisions of Sections 4 and 15 of the Natural Gas Act (R. 136-140).

Pursuant to the provisions of Section 19(a) of the Natural Gas Act, Sun, on October 10, 1957, filed a timely application for rehearing with respect to the order of September 12, 1957 (R. 124-133). The Commission considered this application for rehearing as a motion for reconsideration and denied it by an order issued November 8, 1957 (R. 133-135). Sun also filed on December 2, 1957 an application for rehearing with respect to the suspension order of November 8, 1957 (R. 140-144).[11] By a letter dated December 10, 1957, the Commission rejected this application for rehearing (R. 145).

Proceedings before the Court of Appeals: On January 6, 1958, Sun filed, pursuant to Section 19(b) of the Natural Gas Act, a petition to review the Commis-

[11] Sun sought review of this order on the grounds, among others, that the action taken therein was predicated on the action taken by the Commission's letter order of September 12, 1957 (R. 142).

sion's order of September 12, 1957 and the suspension order of November 8, 1957 (R. 4-18; 19). After hearing, the Court, with Judge Brown dissenting, affirmed the Commission's orders (R. 146-153; 153-164). Judgment was entered on April 17, 1959, and Sun's petition for rehearing was denied June 3, 1959 (R. 164-165). A petition for a writ of certiorari was filed August 18, 1959 and granted November 9, 1959 (R. 165).

SUMMARY OF ARGUMENT

I. Sun filed an application for a certificate of public convenience and necessity as required by Section 7(c) of the Natural Gas Act requesting authority only to make a sale of natural gas pursuant to the gas sales contract of August 26, 1947, the only acts or operations Sun had undertaken on June 7, 1954. The gas sales contract provided for a precisely specified term.

The certificate of public convenience and necessity issued to Sun by the Commission's order of May 28, 1956, only authorized Sun to sell the specific volumes of gas specified, and for the term specified, in the contract of August 26, 1947.

The findings in the order of May 28, 1956 only relate to that sale, because that was the only sale involved and because Sun was only able on that date to show ability to make deliveries of the volumes specified, and for the term specified, in that contract. As of that date the Commission could only have evaluated the factors bearing on the public interest with respect to the sale set forth in that contract.

The ordering paragraphs of the order issued May 28, 1956, only authorized the sale of natural gas "as more fully described in the application * * *." They

do not authorize a service, but only a "sale", one of the "acts or operations" specifically recognized by Sections 7(c) and 7(e) as being subject, separately and distinctly, to the Commission's jurisdiction, and an act recognized by the Natural Gas Act as the jurisdictional activity of the seller under a gas sales contract.

The Commission did not purport to condition the "sale" authorized by the certificate or in any way purport to require Sun to sell volumes of gas in excess of those specified in the sales contract or for a term in excess of that specified. Moreover, even if it had purported to do so, the Commission is not authorized under Section 7(e) of the Act to extend the sale beyond the "whole" of the sale covered by the application, which only sought authority to make the sale pursuant to the sales contract of August 26, 1947. In addition, to have required the sale of volumes of gas beyond those undertaken by the contract of August 26, 1947, would have required Sun to produce additional volumes of gas, a requirement which is prohibited by Section 1(b) of the Act which specifically exempts the production of gas from the Commission's jurisdiction.

Section 7(b) of the Act does not extend the duration of the sale under the contract of August 26, 1947 or the duration of the certificate authorizing such sale. Sun has not sought or proposed to abandon anything, for, upon completion of the sale as authorized by the certificate, the sale and certificate were at an end, and there was no longer any sale or any obligation to sell which could be abandoned. The "facilities" and "service" referred to in Section 7(b) clearly are not greater in scope than facilities, acts and operations which are required to be certificated under

Section 7(c) of the Act. As the primary affirmative jurisdiction is exercised under Section 7(c), Section 7(b) can not encompass more than Section 7(c), and, at the very most, Section 7(b) relates only to the abandonment of that which is certificated under Section 7(c) during the effective term of the certificate. Hence, when the sales contract and the certificate authorizing that sale expired, the jurisdictional act came to an end. This interpretation is in keeping with the Court's holding in CATCO,[12] and to apply Section 7(b) to a completed "certificated" sale would clearly have the effect of requiring a further sale in contravention of the certificate requirements of Section 7(c). Also, CATCO[13] indicates that only the specific supply of gas previously dedicated by the certificate procedure requires authority to abandon.

Extending the term of Sun's sale by the application of Section 7(b), or by any other means, in this proceeding would be contrary to the Congressional intent expressed in the Act and the determinations of this Court in the *Mobile* and *Memphis* decisions,[14] that the Act evinces no purpose to abrogate private rate contracts. To apply Section 7(b) in this proceeding would also be contrary to the policy of Congress which restricts the Commission's jurisdiction over the initiation of sales and extensions of facilities to that set forth in Section 7(a) of the Act.

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[12] *Atlantic Refining Co., et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

[13] *Ibid.*

[14] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956); *United Gas Pipe Line Company* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103, 109-110 (1958).

Therefore, when Sun's first contract expired, the sale made thereunder and the certificate authorizing such sale likewise came to an end, and the Commission could not lawfully reject Sun's application covering another separate and distinctly different sale.

II. Sun's contract of August 26, 1947, expired by its own terms both as a contract and as a rate schedule and the new sales contract of August 1, 1957, effective after the contract of August 26, 1947, expired, did not constitute a "change" in the contract of August 26, 1947 or in the rate schedule consisting of such contract.

The rate-filing provisions of Section 4(c) in which are incorporated by reference the various jurisdictional provisions of the Act, including Sections 1(b) and 7(c), require a separate and distinct initial rate filing with respect to "any * * * sale * * * subject to the jurisdiction of the Commission." The contract of August 26, 1947 filed as Sun's initial rate schedule contained all the terms and conditions of the sale made pursuant thereto. Hence, when the term of the contract expired, in the circumstances of this case, the rate schedule consisting of the contract also expired.

Section 4(d) of the Act, relating to the filing of "changes" in rate schedules, is concerned only with changes in schedules filed pursuant to Section 4(c) which are related to the same sale during its effective term and during the effective term of the rate schedule itself. Sun's contract of August 1, 1957 met neither of these criteria since it related to an entirely separate and distinct sale, and the contract of August 26, 1947, as a contract and as a rate schedule, had expired prior to the date the contract of August 1, 1957 had effect either as a contract or as a rate schedule.

Under this Court's *Mobile* decision,[15] the Commission is accorded only rate review powers, and the rate-making and rate-changing powers remaining with the natural gas companies, and the Commission lacks authority summarily to delay the effectiveness of the August 1, 1957 contract or to extend the term of the August 26, 1947 contract.

The Court below erroneously assumed that the August 1, 1957 contract continued a "service" undertaken by the contract of August 26, 1947. Neither contract related to a "service." Each related to a distinct and unrelated sale. Moreover, the assumption is clearly contrary to this Court's *Mobile* decision[16] that private contracts underlie the whole scheme of regulation and are modified *only* by the Commission's lawful exercise of its rate review authority.

Therefore, the Commission unlawfully rejected the filing of Sun's second contract as an initial rate schedule.

III. The Commission's decision does not promote the purpose of the Natural Gas Act, it is contrary to the regulatory scheme of the Act, and it is not in accord with the public interest. The Commission in this proceeding clearly has not adhered to the regulatory scheme of the Act. It has made no attempt to evaluate the second sale but has erroneously applied its powers under Sections 4(e) and 7(b) of the Act, and exercised power which Congress specifically excluded by Sections 1(b), 4(c), 4(d), 4(e) and 7(c) of the Act.

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[15] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[16] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The Commission's action also is contrary to the foundation principle, as determined by this Court's *Mobile* and *Memphis* decisions,[17] that the Act evinces no purpose to abrogate private contracts, as such, and that Congress sought to attain this aim of the Act, among other ways, by preserving the integrity of private contractual arrangements for the supply of natural gas. The protection of this basic and fundamental concept of the Act is required by independent producers if they are to provide the sources of natural gas which are vital to the social, economic and general welfare of the United States.

I.

THE FIRST SALES CONTRACT WAS LIMITED AS TO VOLUMES, LOCATION AND TERM, AND THE CERTIFICATE AUTHORIZED ONLY THAT SPECIFIC SALE

The certificate issued to Sun on May 28, 1956 was pursuant to Sections 7(c), 7(d), and 7(e) of the Natural Gas Act. The requirement to obtain certificates is set forth in Section 7(c). In part, it provides that no natural-gas company or person which will be a natural-gas company "* * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *." Under the plain language of this requirement an applicant has the right to propose in an application the terms and the conditions of the sale in which the applicant proposes to engage. *Atlantic Refining*

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[17] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956); *United Gas Pipe Line Company* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103, 113-114 (1958).

Co., et al. v. *Public Service Commission*, 360 U.S. 378, 387-8 (1959).

Sun's first sales contract with Southern Natural dated August 26, 1947, was entered into prior to the date of this Court's *Phillip* decision, June 7, 1954.[18] The contract provided for a definite, limited term, and under the law of contracts all rights, duties and obligations thereunder were discharged by performance at the end of the term. Restatement, Contracts, § 386 (1932). Under this Court's *Phillip* decision[19] the sale provided for by the sales contract of August 26, 1947, was subjected to the requirements of the Act. However, the terms of the contract and the sale were not modified by the Act, nor were Sun's obligations in the contract to sell natural gas to Southern Natural increased or modified in any way. *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 109-110 (1958); *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F.2d 943, 954 (CA10-1944), affirmed 324 U.S. 581 (1945); *Cities Service Gas Co.* v. *F.P.C.*, 255 F.2d 860, 864 (CA10-1958), *certiorari* denied 358 U.S. 837 (1958).

Upon the sale becoming subject to the requirements of the Act, however, Sun was required to comply with the above quoted requirement of Section 7(c) and to obtain a certificate authorizing that sale. As of June 7, 1954, and as of May 28, 1956, the date Sun's certificate was issued, Sun's only undertaking to sell gas was set forth in the contract of August 26, 1947. That

[18] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

[19] *Ibid.*

undertaking only required the delivery of limited volumes of gas for a limited term (R. 46, 48). Under such requirements of Section 7(c) and the Commission's Rules Sun was only required to and did seek a certificate authorizing only such sale. This is so because with respect to Sun Section 7(c) speaks only of, and requires a certificate only for, the act of engaging in a "sale," such as was represented by Sun's then existing gas sales contract having a limited term. Section 7(c) is certainly not subject to the interpretation that when a sale is made or proposed, regardless of its terms, a certificate is required to be secured for a perpetual sale or service. Moreover, on these dates Sun could not, and did not, do more than meet the requirements of Section 7(c) of the Act, which provides that the certificate "shall be issued * * * authorizing the whole or any part of the * * * sale, * * *" and no more, "* * * if it is found that the applicant is able and willing properly to do the acts * * * proposed * * *." Sun obviously could not, and did not, apply for any certificate to sell any gas other than that specifically described in its contract, because it then had no market and no sales contract for other gas. Hence, it could not request a certificate authorizing more than the "whole" of its then existing sale, nor could it show that it was "able and willing" to do more than continue and complete its then existing sale.

A. Sun Sought a Certificate to Make the Sale Described in the Contract of August 26, 1947.

Sun sought a certificate to complete the sale pursuant to the sales contract of August 26, 1947. There has been no suggestion that Sun failed in any respect to comply fully with the applicable rules of the Com-

mission. The Court below, however, erroneously found that there was "* * * nothing to show any intent of the Petitioner [Sun] to apply for a limited or conditional certificate, * * *" (R. 151). The fallacy in this statement of the Court below is that Sun did not seek a "limited or conditional" certificate. It sought precisely what Section 7(c) of the Act requires—a certificate authorizing the very sale it had made under the sales contract of August 26, 1947—no more and no less. Sun's application was, of absolute necessity, limited to the contract, and the certificate thereafter issued by the Commission was, of necessity, limited to the sale "as hereinbefore described." Nothing more was either required or permitted by law, inasmuch as Section 7(c) of the Act requires that the certificate "shall be issued * * * authorizing the whole or any part of the * * * sale * * *." A certificate purporting to authorize a perpetual sale or service (which, in truth, would have been the "conditional" certificate in Sun's circumstances) would cover more than the "whole" of the sale by contract, and this is forbidden.

The Commission's applicable[20] rules, and particularly Sections 157.24(a)(4), require that the applicant shall set forth "A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company." Additionally such

[20] 18 C.F.R. § 157.23, *et seq.*

section requires certain specific data which are set forth below.[21]

There is no requirement in this section that an applicant should specify the date the sale would terminate. The requirement for the basic jurisdictional statement is not particularized.

In addition to setting forth in its certificate application the specific information required by Section 157.24(a)(4), it was therein set forth that "Sun was,

[21] "A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

"(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

"(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

"(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

"(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

"(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects."

on June 7, 1954, and now is, delivering gas subject to the contract with the following Purchaser: Southern Natural Gas Company, which contract has either been heretofore filed, or is being filed contemporaneously herewith, as a rate schedule" (R. 28). The contract of August 26, 1947, was thereby incorporated in the certificate application (R. 124).

The contract, as an integral part of the application, specified with particularity the terms and conditions of the sale for which certificate authority was sought. Even a cursory examination of the contract will show that deliveries under the contract were *only* to continue for the term fixed by the contract and that Sun was *only* selling "the quantity of gas called for in this agreement on the terms specified in this agreement * * *" (R. 48, 46). The application also called attention to the limited nature of the sale for which Sun was seeking certificate authority by the following statement: "This application is hereby made *only* for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described" (R. 29). This statement appeared in the application after Sun had set forth all details required by Section 157.24(a)(4) and before the prayer of the application which, alternatively, prayed for a certificate as "herein requested."

The contract of August 26, 1947, incorporated in the application by reference, related to a "sale" of natural gas. As pointed out in Judge Brown's dissent, "sale" is a word of precise legal import, both in law and equity, and means, at all times, a contract between the parties, to give and pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold (R. 159). More-

over, it is a matter of common knowledge that independent producers sell gas evidenced by contracts. Thus, the Court of Appeals for the Fifth Circuit, in *Gulf Oil Corporation* v. *F.P.C.*, 255 F.2d 556, 557 (CA5-1958), pointed out that independent producers "* * * are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public."

Section 7(c) of the Act provides that, if the other requirements are met, a certificate shall be issued for each "sale" or "service." Congress clearly intended to distinguish between a "sale" and a "service," else it would not have used the two terms separately and disjunctively. Obviously, Sun could not and did not apply for a certificate to render a "service" because Sun had no "service" contract. Sun had only a contract for the "sale" of a specifically limited quantity of gas at a specifically described location, deliverable over a specifically limited term.

The Natural Gas Act does not define the term "sale" nor is there any suggestion that that term as used therein is to have a meaning other than its accepted legal meaning. This Court in two decisions[22] issued since the Act was found applicable to independent producers, has pointed out that the Act evinces no purpose to abrogate private rate contracts as such. By incorporating the contract in the certificate application, and by specifically referring to the contract as containing the details of the "pertinent facts" of the jurisdictional statement, there can be no question, under the meaning of the word "sale" and the recog-

[22] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 109-110 (1958).

nized character of an independent producer's activities, that Sun only sought a certificate to make the sale described in the contract and that Sun was *not* seeking to dedicate leases or provide a service.

Now, at this late date, long after the hearing on May 21, 1956, a hearing as to which Sun was notified by the Commission that it was not necessary for Sun to appear or be represented, the Commission apparently takes the obviously erroneous position that a contract for a "sale" of a specific volume of gas, from specific properties, and for a specific term, is not a contract for such a "sale" at all, but is rather a perpetual "service" contract. The Commission now apparently takes the further obviously erroneous position that Sun's application for a certificate to make only the specific "sale" covered by the specific contract, did not represent what it set forth, but that in reality it was an application for a certificate to perform a perpetual unlimited "service." This, despite the fact that Sun had no unlimited perpetual "service" contract and could not, under the Act and the Commission's Regulations, apply for a certificate to do more than it had contracted to do. Finally, the Commission now apparently takes the obviously erroneous position that its certificate issued to Sun, authorizing the sale "as hereinbefore described," did not mean what it said, but was, instead, a certificate not only authorizing, but also requiring, an unlimited, perpetual, and impossible "service."

B. Sun Was Granted a Certificate Only to Make the Sale Pursuant to the Contract of August 26, 1947.

Sections 7(c) and 7(e) of the Act set forth the procedures to be followed by the Commission in processing certificate applications. Section 7(c) of the

Act requires that applications for certificates (other than for temporary certificates) shall be set for hearing and the "* * * application *shall* be decided in accordance with the procedure provided in subsection (e) of this section and such certificate *shall be issued or denied* accordingly; * * *". Section 7(e), in part, provides that

> "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

Section 7(e) also provides that the Commission "* * * shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Sun was granted a certificate of public convenience and necessity by the Commission's order dated May 28, 1956 (R. 99-110). As set forth in the statement above, the notice of hearing with respect to the applications of Sun and others indicated that the Commission would go through the formal procedures of a hearing, and would, as it did, dispose of the applications upon consideration of the pleadings (the ap-

plications), and grant the applications on the basis of the facts set forth therein (21 F.R. 2707; R. 109). The only description of the sale in the certificate order of May 28, 1956, other than by references to applications, is found in the caption, listing applicants—the sellers—and a listing, by docket numbers, of the fields from which gas is sold and the buyers (R. 102-108). This description does no more than identify the applications. The finding and ordering paragraphs make specific references to the applications, and state the "sale of natural gas" is "more fully described" therein. Thus, in reality, Sun's application became a part of its certificate. Hence, resort to Sun's application is appropriate and necessary to determine the authority Sun received by the Commission's Order of May 28, 1956 (R. 109-110).

1. *The Commission's findings signify Sun's certificate authorized only the sale provided for by the August 26, 1947 contract.* The order issued May 28, 1956, appears to make the requisite statutory finding that Sun was "able and willing" to do the acts proposed (R. 109). It did not find that Sun was "able and willing" to do any more than the acts proposed. As of May 28, 1956, Sun was able to carry out the undertaking in its contract of August 26, 1947. On that date, however, Sun was *unable*, and did not, and could not, show ability to do more than comply with the sales contract, and it did not, and could not, show ability to perform a perpetual "service" because Sun had no perpetual "service" contract.

One of the criterion under Section 7(c) for showing ability is to prove the availability of a market for gas to be sold. *Re Kansas Pipe Line Company, et al.* 2 F.P.C. 29, 45 (1945); *Re Atlantic Gulf Gas*

Co., 10 F.P.C. 79, 83 (1951); *Re Texas-Ohio Gas Co.*, 12 F.P.C. 23, 29 (1953). Southern Natural was not obligated on that date to purchase gas from Sun beyond the specific limitations and requirements of the sales contract of August 26, 1947. Under these circumstances, the finding with respect to Sun's ability "to do the acts * * * proposed" could only relate to the contract of August 26, 1947.

The Commission also found that the sale of natural gas by Applicant was required by the public convenience and necessity (R. 109). Under the Court's *CATCO* decision,[23] this finding requires an evaluation of "all factors bearing on the public interest" (360 U.S. at 391). As of May 28, 1956, the Commission could only have evaluated the factors set forth in the contract of August 26, 1947.

2. *The ordering paragraphs in Sun's certificate authorized only the sale provided for by the August 26, 1947 contract.* Paragraphs (A) and (C) of the order of May 28, 1956, which follow, set forth the authority accorded Sun:

> "The Commission ORDERS:
>
> "(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the *sale* by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, *as hereinbefore described and*

[23] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

as more fully described in the application and exhibits in this proceeding.

"* * *

"(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission." (R. 109-110)

It should be noted that the certificate did not even authorize, much less require, a "service," as the Commission now contends was the effect of its certificate. It authorized only the "sale * * * as more fully described in the application and exhibits in this proceeding" (R. 109-110). Section 7(c) of the Act clearly contemplates an application and a certificate for either a "sale" or a "service," but nowhere does the Act contemplate that, long after an application for a certificate for a specific "sale," and the issuance of a certificate for a specific "sale," the Commission may change its position and conclude that it issued a certificate for a perpetual "service," despite the total absence of any evidence authorizing such a conclusion, and despite the total absence of any application for a certificate for a perpetual "service."

The ordinary meaning of the words used in a certificate are controlling in determining their meaning. There is no ambiguity in the Commission's description of the "sale." "[T]he sale of natural gas * * * as more fully described in the application * * *" means only the "sale" which is the subject of the only gas sales contract involved and the only one in evidence in the proceeding. *Andrew G. Nelson, Inc.* v. *U. S.*, 355 U.S. 554; 557-558 (1958). It could not possibly refer

to some nebulous perpetual "service agreement" which did not even exist, and which is even now only a creature of the Commission's latter-day imagination.

Paragraph (A) issued a certificate authorizing, without modification, the sale described in Sun's application, upon the terms and conditions of the order. The only sale described in the application is the sale pursuant to the contract of August 26, 1947.

The Commission apparently contends that Sun did not apply for a certificate "limited as to time," and that, therefore, the certificate issued was not so limited. But that position patently begs the issue and overlooks and ignores the fact that Sun had only a contract of sale strictly limited as to volume, location and time; the fact that Sun applied only for a certificate to make the "sale" specifically created by that contract and could not, and did not, apply for a certificate to render a perpetual "service;" the fact that there was no evidence in the proceeding supporting a certificate for a perpetual "service," as distinguished in Section 7(c) of the Act from a "sale;" the fact that Section 7(c) specifically *requires* that the Commission *shall* issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *;" and the fact that the Act does not even contain authority for the issuance of a certificate for more than the sale covered by the application, as distinguished from authority to limit or condition the certificate applied for.

The Commission may also contend that its certificate was for a perpetual "service" because of the provisions of ordering Paragraph (C), which is quoted above. But it is apparent that the only "acts or operations" authorized by the certificate in so far as

Sun's proceeding was concerned, were those pertaining to the "* * * sale * * * as more fully described in the application * * *." It obviously follows that the certificate was effective only so long as Sun continued that "sale" during the term of its gas sales contract.

3. *Section 7(e) negates the construction that Sun's certificate authorized more than the sale provided for by the contract of August 26, 1947.* Under the language of Section 7(e) quoted above, the Commission is required to follow certain procedures with respect to a certificate application, and, if the applicant makes the requisite showings, the Commission is required to issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *." Under this provision of 7(e) the Commission is not authorized to issue a certificate which would extend a sale beyond that covered by the application since such a certificate would cover more than the "whole or any part" of the sale which is the subject of the application. Under this requirement, it may be presumed that there is no intention to extend the certificate beyond the request in the application unless specific, reasonable and lawful conditions are incorporated in the order granting the certificate pursuant to the authority given in Section 7(e) to attach reasonable conditions. If reasonable and lawful conditions are intended, it may also be presumed that they would be set forth in unambiguous language and ample opportunity accorded to accept or reject them. The language of the certificate, as discussed above, does not justify a conclusion that the Commission intended to extend the certificate authority beyond that requested in the application.

4. *The Commission lacked authority to condition the certificate issued to Sun to require Sun to sell gas after the expiration of the contract of August 26, 1947.* To require Sun to continue the sale after the expiration of the contract of August 26, 1947, would require Sun to produce gas in excess of the "quantity of gas called for in this agreement" (R. 46). Moreover, a provision in a sales contract limiting the term is just as much a quantity limitation as are the specific quantity provisions. In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 505, 507 (1949), the Court held that Section 1(b) of the Act "* * * excluded the Commission from exercising *any* direct control or regulation over the actual production * * * of natural gas." Moreover, this Court pointed out that "* * * leases are an essential part of production" and that "Sections 4, 5 and 7 [of the Act] do not concern the production or gathering of natural gas; rather they have reference to the interstate sale and transportation of natural gas and are so limited by their express terms." Thus, had the Commission conditioned the certificate to require a sale beyond the date Sun had obligated itself to deliver volumes of gas, which the Commission did not do, such a condition would have exceeded the Commission's authority.

The condition would be unlawful because the Commission would thereby purport to compel the production and gathering of additional gas beyond the terms and duration of the sales contract, and this the Commission is prohibited from doing in the light of the "production or gathering" exemption of Section 1(b) of the Natural Gas Act. That the "production or gathering" exemption of Section 1(b) is applicable to this type of situation is also made clear in *Pan-*

handle Eastern Pipe Line Company v. *Federal Power Commission*, 204 F.2d 675, 680 (CA3-1953).

Additionally, the power accorded the Commission to attach reasonable conditions by Section 7(e) of the Act is limited by and must be read in conjunction with the Commission's power to authorize "* * * the whole or any part of the * * *" sale covered by the application. The authority to attach conditions clearly was not intended to authorize the Commission to extend a fixed term sale beyond the term thereof or to convert an obligation to sell specific volumes of gas to a dedication of the leases for so long as natural gas may be produced therefrom.

5. *The Commission's apparent policy that all independent producers' certificates should be of unlimited duration, adopted after May 28, 1956, cannot be applied retroactively to Sun's certificate.* For the reasons set forth above, the certificate issued May 28, 1956 *only* authorized the sale described in Sun's application. Under these circumstances, the Commission may have applied retroactively in this case a policy later announced that independent producers' certificates should not be limited in term.[24] This policy appears to be predicated on the erroneous construction by the Commission of the place of Section 7(b) in the regulatory scheme contemplated by the Natural Gas Act as discussed below. In any event, the Commission is not authorized to modify retroactively by the adoption of a new policy the certificate issued to Sun. *U. S.* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947).

[24] *See Re Sunray Mid-Continent Oil Company, et al.*, 19 F.P.C. 1107, 1108 (1958); *Re Mid-Continent Oil Company*, 20 F.P.C. 824, 826 (1958).

6. *Section 7(b) of the Natural Gas Act does not extend the duration of the Sale under the Contract of August 26, 1947.* It is shown above that Sun's certificate authority with respect to the sales contract of August 26, 1947 was co-extensive with the term of that contract. Accordingly, when the certificate authority terminated on the date as of which the sale was completed and the contract expired by reason of performance, Sun was required to obtain new certificate authority to sell additional gas from the Gwinville Field. The Commission's position, however, is that Section 7(b) of the Act somehow requires a continuation of deliveries of gas from that field to the same purchaser.

Section 7(b) provides:

> "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

By its very terms, Section 7(b) of the Act is clearly not applicable to the circumstances of this case. At the outset, it is plain that Sun has not sought or proposed to "abandon" anything. Sun's first sales contract simply expired by its own terms. There can be no abandonment of that which otherwise does not even exist; in such a situation there are no rights or obli-

gations which remain subject to abandonment. As already pointed out, when Sun's first sales contract expired by its own terms, Sun's certificate likewise came to an end. In these circumstances there was nothing which could conceivably be abandoned—the entire transaction simply came to a lawful end.

This is so because in its identification with "facilities" and "service," Section 7(b) of the Act certainly refers to nothing of any greater scope than the facilities, acts and operations which are required to be certificated under Section 7(c) of the Act. Since the primary exercise of affirmative jurisdictional authority is contained in the requirement of certification, Section 7(b), relating to abandonment, can not encompass more than Section 7(c), relating to certification. At the very most, and we say this only *arguendo*, the two sections relate to the same things, so that whatever must be certificated under Section 7(c) may not be abandoned without Commission approval under Section 7(b). And this statement, although it is over-stated in favor of Commission authority, is sufficient to speak our point. We have shown that with respect to Sun's first sales contract Sun applied under Section 7(c) only for a certificate to make and complete that particular and limited "sales," and that Sun was issued under Section 7(e) a certificate which authorized no more than that particular and limited "sale." Hence, when the sales contract expired by its own terms and the certificate authority likewise expired, the jurisdictional act and authority had come to an end and there was no continuing act or authority which could be abandoned and to which the provisions of Section 7(b) could conceivably apply. This conclusion is in keeping with

this Court's holding in the *CATCO* decision[25] that the "heart of the Act" is found in Sections 4, 7(c), and 7(e) (360 U.S. at 388). The Commission's attempt to apply Section 7(b) here is in direct contravention of that holding, for the effect of the Commission's position is to require the continued delivery of gas after the only certificated "sale" has expired. Thus, the Commission would unlawfully require a continued sale for which there is no certificate, even though the statute plainly provides that no sale shall be engaged in unless the natural-gas company holds a certificate with respect to the sale.

Section 7(b) is a complementary section to Sections 7(c) and 7(e). Section 7(b) may apply to certain facilities and acts which are certificated under Sections 7(c) and 7(e), during the effective period of the certificates, but it can never apply to any facilities or acts which are not subject to effective certificates. Sun's situation is in the latter category, since its certificate expired with the expiration of the sale made under its first sales contract.

This Court made clear in its *CATCO* decision that Section 7(b) can only be applicable where the acts involved are covered by an effective certificate. In that case, after setting forth that the Act prohibits any "* * * such movements unless and until the Commission issues a certificate of public convenience and necessity therefor, * * *" the Court further pointed out that "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of *that supply*

[25] *Atlantic Refining Co., et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

from continued interstate movement without Commission approval" (360 U.S. at 389). In the context of the Court's statement, the gas which is dedicated to the interstate use through the certificate procedure is that which has been subjected to a contract commitment, and it is the gas subjected to the contract commitment which constitutes the "supply" which may not be withdrawn without Commission approval. No other supplies are subject to the inhibition against withdrawal. In Sun's case, even if it were assumed, *arguendo*, that the inhibition applies to a "sale," as distinguished from a "service," nevertheless the first sales contract, limited as to volume and term, constituted the only "supply" which could not be withdrawn, and upon completion of the contract and the delivery of the "supply" of gas committed thereunder, the inhibition of Section 7(b) of the Act no longer applied.

By applying Section 7(b) without regard to the effective certificate authority, the Commission is not in accord with the Congressional policy, as expressed in this Court's *Mobile*[26] and *Memphis*[27] decisions, that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such" (350 U.S. at 338; 358 U.S. at 110, and that Congress in drafting the Act manifested its concern for the legitimate interest of natural gas companies in whose financial stability the consuming public has a vital stake by "preserving the 'integrity' of private contractual arrangements for the supply of natural gas * * * (subject * * * to any

[26] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[27] *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103 (1958).

overriding authority of the Commission) * * *" (358 U.S. at 113-114). As pointed out above, the Commission did not purport to exercise any overriding authority and does not have regulatory authority to require Sun to continue to sell beyond the sale for which authority was sought or to produce additional volumes of gas.

By applying Section 7(b) without regard to the effective certificate authority the Commission is assuming authority not accorded it by the Congress over sales and transportation. Except for the authority accorded the Commission by Section 7(a) of the Act, the Commission is not authorized to initiate or require the sale or transportation of gas in interstate commerce.

The authority accorded the Commission by Section 7(a) relates to the extension and improvement of transportation facilities, to the establishment of physical connections with gas lines of local distributors, to sales to local distributors, and to the extension of lines to communities adjacent to lines. The authority in Section 7(a), however, is subject to the specific limitation that the Commission shall have no authority to compel the enlargement of transportation facilities for the above-enumerated purposes or to compel natural-gas companies to establish physical connection or sell gas when to do so would impair the ability of the natural gas company to render adequate service to its customers.

Section 7(a) is, of course, not applicable to sales by independent producers to pipeline companies. It does, however, suggest that the Commission's authority even within the specific limits of the section to initiate and require sales is to be strictly construed.

Cf. Panhandle Eastern Pipe Line Company v. *F.P.C.*, 204 F.2d 675 (CA-3 1953); *The Central West Utilities Company* v. *F.P.C.*, 247 F.2d 306 (CA-3 1957).

The Natural Gas Act, unlike Section 1(4) of the Interstate Commerce Act [28] and Section 201(a) of the Communication Act,[29] which requires common carriers to furnish service upon reasonable request therefor, does not subject natural gas companies to a duty to provide transportation or sell natural gas upon reasonable request therefor. The regulatory scheme under the Natural Gas Act requires the proponents of a sale or transportation to present it to the Commission for approval. After approval is obtained and the sale or transportation commences, the proponents become natural gas companies and must, to the extent Section 7(b) is applicable, continue the Act as authorized for the certificate term, unless authority to abandon pursuant to Section 7(b) is accorded by the Commission.

Moreover, in contrast to the limited power accorded the Commission under Section 7(a), Section 1(21) of the Interstate Commerce Act [30] and Section 214(d) of the Communications Act,[31] authorize the Commissions administering those Acts, after notice and opportunity for hearing, to require, with limitations, "common carriers" subject to those Acts to provide adequate facilities for the interstate service subject to those Acts. The differences in these Acts clearly reflect that Congress did not intend that natural gas

[28] 49 U.S.C. § 1(4).

[29] 47 U.S.C. § 201(a).

[30] 49 U.S.C. § 1(21).

[31] 47 U.S.C. § 214(d).

companies should have statutory service or sales obligations beyond their undertakings pursuant to Section 7(c) of the Act and did not intend that the Commission should be empowered to require service or sales in addition to specific undertakings proposed by the certificate procedure, except the limited authority in Section 7(a) already discussed.

As Congress obviously intended not to give the Commission jurisdiction to require sales by independent producers, Section 7(b) clearly does not indicate a Congressional policy that independent producers' certificates should be unlimited in term.

II.

THE FIRST SALES CONTRACT EXPIRED BY ITS OWN TERMS, BOTH AS A CONTRACT AND AS A RATE SCHEDULE, AND THE SALES CONTRACT OF AUGUST 1, 1957, COVERING A DIFFERENT VOLUME OF GAS, DID NOT CONSTITUTE A CHANGE IN RATE SCHEDULE

Sun's first contract, that of August 26, 1947, expired and terminated by its own terms at the expiration of the term stipulated in the contract. Sun's second contract, that of August 1, 1957, does not alter, amend, or continue in effect the first contract. It clearly represents a completely new, distinct, and separate sale of other and different gas.

In its order of September 12, 1957, the Commission recognized that the first sales contract had expired (R. 124). The Court of Appeals appears to agree that the first contract had terminated (R. 150). The two contracts are separate and distinct, and the second contract makes no reference to the first contract (R. 32-55, 61-86). The second contract was not to be effective until after the expiration of the first (R. 82).

What, then, was the status of the second contract, with respect to the initial rate filing provisions of the Natural Gas Act? Under Section 4(c) of the Act,

> "* * * every natural-gas company shall file with the Commission, * * * and shall keep open in convenient form and place for public inspection, *schedules showing all rates and charges for any* * * * *sale* subject to the jurisdiction of the Commission, * * * *together with all contracts* which in any manner affect or relate to such rates, charges, classifications, and services."

Within the meaning of those initial rate filing provisions Sun's second contract accomplished a sale of gas which is entirely separate and distinct from any other sale. Section 4(c) refers to and requires an initial rate schedule filing for "any sale." Moreover, in speaking of any sale "subject to the jurisdiction of the Commission," Section 4(c) incorporates by reference the various jurisdictional provisions of the Act, including Sections 1(b) and 7(c), which treat separately each sale of gas. Hence, Sun is entitled, and even required, by Section 4(c) to file its second contract as an initial rate schedule.

By the same token, Sun's second contract cannot lawfully be treated as a "change" in any existing rate schedule, nor may Sun lawfully be required to file the contract as a "change" in any rate schedule in order to make its terms effective. The first contract expired by its own terms. It no longer existed as the basis for any change. There was no relationship between the first and second contracts which could be made the basis for any assertion that the later contract was a "change" in the first contract.

When Sun filed and the Commission accepted Sun's first contract, that of August 26, 1947, as a rate schedule, the contract itself in *all* of its terms became Sun's rate schedule, including the provision for a fixed termination date. Section 4(e) of the Act is open to no other reasonable construction. Hence, when the term of the contract expired, the rate schedule consisting of the contract likewise expired, and there was then no rate schedule left in existence which could be the subject of a "change."

This analysis of the rate schedule provisions of the Act is, as it should be, entirely consistent with the corresponding certificate provisions of Sections 7(c) and 7(e) of the Act, which require a certificate for each separate "sale." We have shown that when Sun's first contract expired by its own terms, Sun's certificate for that sale likewise expired. By application of the same reasoning, when Sun's first contract expired, its rate schedule consisting of that contract likewise expired. And again, Sun's second contract, when filed, could only constitute a new and separate initial rate schedule entirely unto itself, and not a mere "change" in an expired rate schedule.

Section 4(d) of the Act, relating to the filing of changes in rate schedules, deals only with rate schedules which have been filed and accepted under Section 4(c) and which are still in force under Section 4(c). Thus, Section 4(d) provides that,

> "* * * no change shall be made by any natural-gas company in any *such* rate, charge, classification, or service, or in any rule, regulations, or *contract* relating thereto, except after thirty days' notice to the Commission and to the public. * * *"

It is apparent that the provision for such notice relates only to a change in a rate or in a contract containing a rate which is otherwise still in force and effect under Section 4(e). If the rate or the contract has expired by its own self-contained terms which were filed and accepted as part of the rate schedule in accordance with Section 4(e), there is then nothing left which can be the subject of a notice of change under Section 4(d). The further language of Section 4(d) confirms this result by providing the procedure for giving the notice of a change in a rate schedule "then in force."

At the effective date of Sun's second contract, which occurred after the termination of the earlier rate schedule, there was no other contract or rate schedule "then in force" as to which the second contract could be considered a "change." The first contract had expired and the rate schedule consisting of that contract had likewise expired by its own terms. In such a situation the second contract could not conceivably be treated as a change in the first within the meaning of the rate provisions of the Act.

If the language of the Act itself is not enough in this connection, this Court made clear the proper application of the provisions of Section 4, in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 338 (1956), when it said, "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such." The Court proceeded to explain that the basic scheme of the Natural Gas Act is to permit rates to be determined in the first instance by the natural-gas companies, by contract or otherwise. The initial rate-setting powers are thus with the natural-gas com-

panies, and the Commission has neither a rate-making nor a rate-changing power, but only the power to review rates and contracts made in the first instance by the natural-gas companies.

Under this Court's analysis of the Act in *Mobile*, Sun's contract of August 1, 1957, constituted an exercise by Sun of its initial rate-setting power, and the Commission is without authority to treat the contract as a "change" within the meaning of Section 4 of the Act. The Commission has no power to summarily delay the effectiveness of the second contract beyond the effective date provided in the contract, simply because such a delayed effectiveness is not contemplated by the contract—yet that is precisely what the Commission purported to do by its orders. By the same token, the Commission is without power to summarily extend the term specifically set out in the earlier contract, simply because the extended term is not contemplated by that contract—yet that is precisely what the Commission purported to do by its orders. Each contract represented an exercise by Sun of its lawful initial rate-setting power under the provisions of the Natural Gas Act, as construed by this Court in *Mobile*.

In the light of this Court's decision in *Mobile*, there can be no question that the suspension power set out in Section 4(e) of the Act is not available to the Commission under the circumstances of this case. Whether a "change" has occurred in a rate schedule is to be determined in the first instance (subject to the rate review powers of the Commission) in accordance with the contracts made by the parties themselves, not by the Commission. Here no "change" in the first contract was agreed to by the parties: they made no

amendment or supplement or modification of that contract; it simply expired by its own terms. Section 4(e) of the Act is plainly inapplicable.

A majority of the Court of Appeals, after citing that Court's earlier decisions in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388 (CA5-1947), *cert.* denied, 332 U.S. 770, and *Bel Oil Corporation* v. *Federal Power Commission*, 255 F.2d 548 (CA5-1958), *cert.* denied, 358 U.S. 804, concluded as follows:

> "* * * It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate * * *." (R. 150)

It is respectfully submitted that the Court below, speaking through the majority, erred in the foregoing statement, and that such a conclusion as that reached by the Court does not follow, necessarily or otherwise, from the authorities cited or from any other authorities.

Neither the *Mississippi Power & Light Company* case nor the *Bel Oil Corporation* case is applicable here, and both are clearly distinguishable from Sun's case. Both cases clearly involved changes in otherwise existing, presently effective contracts and rate schedules. In the *Mississippi* case the change appears to have been made in a presently effective contract filed as a rate schedule. In the *Bel* case the change was

made wholly within the effective term of a producer's gas sales contract.

We have shown that Section 4(d) of the Act, by its most liberal interpretation, applies only to changes in presently effective rate schedules which would continue in effect except for the change. Both the *Mississippi* and *Bel* decisions are consistent with such an interpretation, and consistent with *Mobile*, in that they dealt solely with changes in rate schedules which would otherwise continue in effect, except for the change. But it does not follow, nor can it follow, from either the Act or the *Mississippi* and *Bel* cases that a complete, new and unrelated gas sales contract, such as Sun's second contract, constitutes a "change" in an expired contract, one which is no longer effective either as a contract or as a rate schedule. Obviously, something which does not exist can not be changed. Sun's first contract was completely performed, without any change, and neither the buyer nor the seller had even sought to change or amend it in any respect. Under such circumstances, Sun's second contract could only be treated as an initial rate schedule under the terms of Section 4(e) of the Act.

The majority of the Court below was likewise in error, it is submitted, in characterizing Sun's second contract as being "for the same service" as was provided by the first contract which had expired (R. 150). We have shown that neither of the contracts represented a "service," but that each in fact constituted an entirely distinct, separate and unrelated "sale" of a commodity, gas, in a specific volume and for a specific term. In denominating both contracts as covering the "same service," the Court below has not inquired into, but has rather *assumed* the answer to the

principal issue in this case, without support in the Act or in the cases. Neither the *Mississippi* nor the *Bel* case, in dealing with existing, presently effective rate schedules and contracts, is authority for the proposition that some form of new life can be breathed into a terminated sales contract so as to make of it a perpetual and universal "service" agreement. Moreover, there is nothing in the record here to indicate that either contract constituted a "service," and much less did the contracts constitute the "same" service. It is clear from the record that the contracts were entirely different and distinct in all major respects, and related to entirely different "sales" of entirely different volumes of gas. In effect, the majority of the Court below has ignored the contracts, and has substituted a vague universal "service" concept not contemplated by the Act.

We believe that the basic error involved in the Court's determination is aptly phrased by Judge Brown, in his dissenting opinion:

> "Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that 'upon the *termination* of a contract' a '*new* contract between the same parties' is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*." [*United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956)] (R. 156)
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> * * * * * * *
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> "The Supreme Court [in *Mobile*] makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by determination of the Commission made after notice, hearing and

> order. This basic approach pervades all said and done in *Mobile*. * * *" (R. 160) (Emphasis not added)

In the light of *Mobile*, this view by Judge Brown of the result reached by the conclusion of the majority of the Court below is likewise pertinent:

> "* * * I would be the first to think that we could legislate interstitially, but that hardly includes ingraftment or transplanting of a congentially missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon." (R. 156)

The "congenitally missing organ" is the gap between the "sale," represented by the contract, on the one hand, and the perpetual dedication to a "service," as found by the Court to exist, on the other hand. That is the gap which the majority of the Court below so quickly bridges by holding that the latter "necessarily follows" from the former. But the gap cannot, and should not, be bridged because this Court has clearly said in *Mobile* that Congress, with deliberate intent and purpose, installed the gap and meant that it should be preserved. If the gap is no longer proper, to which we do not agree, it is for Congress, and not the Courts, to make the bridge. Meanwhile, the terms of the private contracts determine (subject to the supervision and review powers of the Commission) the extent and term of both the certificates and the rate schedules. In this light, Sun's second contract could only be an initial rate schedule, not a "change" in a terminated rate schedule. And in this light, a contract canont be accorded integrity,[32] as this Court

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[32] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956).

has said it must, and still be construed as requiring the sale (but not the purchase) of other and different volumes of gas, as the Court below appears to have proclaimed.

III.

THE COMMISSION'S DECISION DOES NOT PROMOTE THE PURPOSE OF THE NATURAL GAS ACT, IS CONTRARY TO THE REGULATORY SCHEME OF THE ACT, AND IS NOT IN THE PUBLIC INTEREST

In this proceeding, the Commission has held, in effect, that the thousands upon thousands of gas producers in the United States have no right to sell batches of gas into interstate commerce under effective sales contracts with any degree of integrity or stability. The Commission has here held, in effect, that the provisions of a gas sales contract between a producer and a buyer, which relate to both quantity and delivery term, have no meaning or sanctity whatsoever. The Commission has here held, in effect, that when a producer sells a batch of gas by a gas sales contract, he automatically becomes obligated to sell, not only that batch of gas, but that thereafter he must keep on delivering additional and further batches of gas, presumably of the same quality, in complete disregard of the fact that no contract therefor exists, in complete disregard of the fact that he may not even own any more gas and may never even be able to find any more, or even be able to produce it under state regulation. And this, even though the buyer is apparently no longer bound, after the contract is fulfilled and terminated, to either take or pay for the gas which the Commission insists that the seller is, without contract, obligated to deliver.

It is to be noted that Southern Natural Gas Company, the buyer in Sun's gas sales contract of August

26, 1947, is not a party to this case, and did not attempt to intervene. Presumably it is satisfied with the contract and agreeable to its sanctity and integrity. In *Mobile*,[33] the buyer in the case was insisting upon the integrity of its contract which the seller was trying to avoid. In *Mobile*, the Commission was on the side of the seller, who sought to avoid the contract, and insisted that the contract had no integrity.

Here, the Commission stands alone. Here, the seller is insisting upon the integrity of its contract, and the absent buyer is presumably willing to live up to its contract. It is only the Commission which is not satisfied with the integrity of the contract.

This situation presents many practical questions to the thousands upon thousands of gas producers and explorers in the country today, and undoubtedly also presents many problems to pipelines, distributors, and consumers. Why enter into a contract if it has no sanctity or integrity? Why should the seller obligate himself if the buyer is not likewise obligated? If the contract has no integrity, then how can either the buyer or the seller safely plan his business future? These are only a few of the many practical questions facing the gas industry today in the light of the Commission's contentions here.

In *Mobile*,[34] this Court said that,

> "* * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * *" (350 U.S. at 344)

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[33] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[34] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

So, why should the Commission here continue to insist that contracts have no integrity or stability, in a case where both buyer and seller are apparently both willing to live up to their contract one hundred percent, and apparently both willing that the contract have integrity and sanctity?

Apparently, Judge Brown, in his dissent below, answered that question, as follows:

> "Both expresed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e. quantity) of the contract. Assuming that this is for us, rather than the Congress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that the 'new' contracts are substantially different. They are not, as claimed, for the same service but only at a different price. One committing himself for two decades instead of 10 years not only to make the sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificial short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in fact but a paper transaction." (R. 161-162)

What "administrative regulation [by the Commission] would be thwarted" if the parties to contracts can prescribe their terms and provisions?

In the preceding sections we have shown that the Commission's contention and decision is not in accord with the regulatory scheme of the Act. It has also been shown that the Commission is attempting to exceed its jurisdiction under Section 1(b) of the Act by requiring production of natural gas.

In the preceding sections we have also shown that the action of the Commission is directly contrary to the fact that the Act evinces no purpose to abrogate private contracts.[35] The effect of the Commission's action has been so far-reaching in denial of Sun's contract and property rights as to amount to a deprivation of property without due process, in violation of the Fifth Amendment to the Constitution of the United States.

We now show that the action of the Commission is not in the public interest and does not promote the primary aim of the Act—"to protect consumers against exploitation at the hands of natural gas companies".[36]

Mr. Justice Jackson, in the *Hope* case,[37] set forth in detail the development of the natural gas industry and many of the complexities involved in the production and sale of natural gas. The billions upon billions of dollars invested in the natural gas industry demonstrates the importance of natural gas to the social, economic, and general welfare of the United States.

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[35] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956).

[36] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[37] *Ibid.*, at 628.

It is a matter of common knowledge that the relationships between all of the several branches of the natural gas industry have developed throughout the years under private contractual arrangements, subject, of course, to the overriding authority of the Commission which it clearly did not validly exercise in this proceeding.

This case affects not only the thousands upon thousands of both large and small gas producers in the United States, as well as the thousands who venture capital but have not yet discovered marketable reserves, but also all segments of the industry and the consuming public at large. For scores of years thousands of gas producers have been selling batches of gas, large and small, into the market place, under a multitude of circumstances and conditions, and under gas sales contracts of many different types. Every year hundreds go out of business because wells die and the explorer can find no more gas. Every year hundreds of new ones enter the business, selling a batch of gas here and there, if they can find both the gas and a market for it. The industry has grown up and developed through the years with the firm belief among prospectors, explorers, producers, pipe line purchasers, distributors, and consumers alike, that contracts among and between them have integrity and sanctity.

Prospectors and explorers for new underground gas reserves have risked their capital, with heavy odds against their finding any new reserves, with the assumption that, if they did find a new batch of gas, and if they could find a market for it, they could sell it or parts of it into the market place under contracts which have integrity and sanctity. Some found new reserves. Many failed.

In *Memphis*,[38] this Court pointed out that Congress, in drafting the Natural Gas Act, "* * * was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas consuming public has a vital stake * * *." Also this Court there pointed out that Congress had this concern in mind in "* * * preserving the 'integrity' of private contractual arrangements for the supply of natural gas * * *," subject of course to any overriding authority of the Commission. (358 U.S. at 113-114.)

Without such "'integrity' of private contractual arrangements", there can be no stability in which the gas consuming public has that vital stake. Without such "'integrity' of private contractual arrangements", neither any branch of the industry nor consumers can appraise the future with any reasonable degree of accuracy or dependability.

Aside from the matter of stability of contracts, explorers and producers are already in the most unstable position of any segment of the industry. Neither the Commission nor anyone else can ever guarantee that he will not lose every dollar of his investment when he explores. No one can guarantee that, if he finds gas, it will be in merchantable quantities. No one can guarantee that, if he finds merchantable gas, he can find any market for it. No one can ever guarantee that, even though he finds a market for it, he can ever recoup his investments. The producer gambles under those and many other unstable hazardous conditions which do not obtain in other branches of the industry. It is not in the public interest to now take

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[38] *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

away the integrity of contracts and thus add an additional hazard and element of instability to his gambles.

So, it is respectfully submitted that the Commission's apparent "apprehension that its administrative regulation would be thwarted," if parties can prescribe the terms and conditions of the contract, is entirely an unjustified apprehension, it is not in accord with the regulatory scheme of the Act, it is directly contrary to the purpose of the Act, it is not in the public interest, and does not promote the primary aim of the Act (R. 161).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Brief of Petitioner, Sun Oil Company, was served upon the Federal Power Commission by mailing a copy thereof, postage prepaid, to each of the following attorneys for the Federal Power Commission on this 13th day of February, 1960:

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APPENDIX

Excerpts from the Constitution of the United States

Amendment V—Capital Crimes: Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES; SECTION 1.

. . . . . .

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (b)]

. . . . . .

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4.

. . . . . .

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such

schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c].

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to com-

munities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f(b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commis-

[1] Subsection 7(c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

sion, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission, and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)][2]

. . . . . .

[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or

any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served; it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

[4] Subsection 7(e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

* * * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19.

* * * * * * * * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[8] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

[8] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole ~~or in part,~~ any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * * * * * * *

Excerpts from Rules of Practice and Procedure of the Federal Power Commission

1.30 DECISIONS

* * *

(c) *Waiver and omission of intermediate decision procedure.* (1) In lieu of any intermediate decision (initial by presiding officer, recommended by presiding officer or designated responsible officer, or tentative by the Commission), any party or staff counsel in any proceeding may request that the Commission forthwith render the final decision; and if all other parties and staff counsel

join or concur in such request, it shall be deemed to have been granted unless the Commission denies such request within 10 days next following its submission or filing. In such requests for omitting the intermediate decision procedure there shall be specified:

(i) The concurrence of the other parties and staff counsel;

(ii) Whether opportunity for presenting oral argument or filing briefs before the presiding officer or Commission is desired or waived;

(iii) Whether opportunity for presenting proposed findings and conclusions with supporting reasons therefor, is desired or waived; and

(iv) Whether the parties reserve only their rights to apply to the Commission for rehearing and to petition for judicial review of the Commission's decision or order as may be provided for by the statute under which the proceeding was initiated and conducted.

[Subparagraph (1) amended by Order 175, F. R. 5213, Aug. 18, 1954]

(2) In rule-making or initial licensing proceedings the Commission with or without request or motion therefor, may render the decision upon a finding on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(3) Requests for waiver and omission of the intermediate decision procedure shall be by motion filed with the Commission at any time during, but not later than five days next following, the conclusion or adjournment sine die of the hearing; shall be in writing under oath, subscribed and verified; and shall in all other respects conform to the requirements of §§ 1.12 and 1.15 to 1.17, inclusive: *Provided, however,* That during sessions of hearings in proceedings, motions for such waiver and omis-

sion may be made orally on the record before the presiding officer, who shall forthwith report the same to the Commission.

* * * * * * * * * * *

1.32 SHORTENED PROCEDURES

* * *

(b) *Noncontested proceedings.* In any proceeding required by statute to be set for hearing, the Commission when it appears to be in the public interest and to the interest of the parties to grant the relief or authority requested in the initial pleading, and to omit the intermediate decision procedure, may after a hearing during which no opposition or contest develops, forthwith dispose of the proceedings upon consideration of the pleadings and other evidence filed and incorporated in the record: *Provided*, (1) the applicant or initial pleader requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission; and (2) no issue of substance is raised by any request to be heard, protest or petition filed subsequent to publication in the Federal Register of the notice of the filing of an initial pleading and notice or order fixing date of hearing, which notice or order shall state that the Commission considers the proceeding a proper one for disposition under the provisions of this section, and shall otherwise conform with the requirements of § 1.19. Requests for the procedure provided by this section may be contained in the initial pleading or subsequent request in writing to the Commission. The decision of the Commission in such proceeding after noncontested hearing, will be final, subject to reconsideration by the Commission upon application for rehearing as provided by statute.

* * * * * * * * * * *

Excerpts from Order No. 174-A of the Federal Power Commission

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 5 and 16 thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), *orders:*

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.*—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

• • •

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer*—(a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27.

• • •

§ 157.24 *Contents of application.* (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

• • •

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas com-

pany. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

* * * * * * * * * *

[redacted]

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Office-Supreme Court, U.S.
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MAR 28 1960
JAMES R. BROWNING, Clerk

No. 321

In the Supreme Court of the United States

October Term, 1959

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 146–164) are reported at 266 F. 2d 222. The letter order of the Federal Power Commission, dated September 12, 1957 (R. 123–124), is not reported. The Commission's orders, issued November 8, 1957 (R. 133–135, 136–138), are reported at 18 F.P.C. 609, 611. The letter order of December 10, 1957 (R. 145), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (R. 164). A petition for rehearing, timely filed, was denied on June 3, 1959

(R. 165). The petition for a writ of certiorari was filed on August 18, 1959, and granted on November 9, 1959 (R. 165), 361 U.S. 880. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTIONS PRESENTED

1. Whether the rate established by a new contract, pursuant to which a producer of natural gas agrees, after expiration of a pre-existing contract, to continue selling gas to a pipeline, from the same gas reserves from which it had supplied the pipeline at a lower rate under the expiring contract, constitutes a "change" in rate which can become effective only in accordance with the procedures of Section 4(d) of the Natural Gas Act.

2. Whether, in the circumstances of this case, the Commission was correct in construing the certificate of public convenience and necessity previously issued to petitioner as an authorization of unlimited duration to make sales of gas to the pipeline from the described reserves.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717–717w, and of the Commission's regulations, 18 C.F.R. 1.1, *et seq.*, are set out in the Appendix, *infra*, pp. 51–63.

STATEMENT

Petitioner Sun Oil Company, an independent producer of natural gas, sells gas from certain leases in the Gwinville Field in Mississippi to Southern Natural Gas Company, the exact amounts depending on the

latter's needs in the operation of its interstate pipeline. The sales were commenced under a contract entered into in August 1947 for a term of ten years from the date of first delivery (R. 32).

In anticipation of the contract's expiration on September 3, 1957, Sun negotiated a new agreement with Southern, dated August 1, 1957, for continued sales by Sun from the same field (R. 81–85). This new agreement was to be effective upon the expiration of the existing contract (R. 82). The new agreement contained terms and conditions similar to those in the existing contract and on its face provided for the sale of gas to Southern from the identical acreage and wells, by means of the same facilities, as in the existing contract (R. 32–33, 62–63). The new contract, however, contained a rate of 20 cents per Mcf instead of the rate of 7.36 cents per Mcf under the old contract (R. 46, 77, 134).[1]

After this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the promulgation by the Federal Power Commission of its No. 174 series of orders implementing that decision (18 C.F.R. (1958 Supp.) 154.91 *et seq.*), petitioner on November 30, 1954, sought a disclaimer of Commission jurisdiction or, in the alternative, a certificate of public con-

[1] Under the 1957 contract, which provided for a base rate of 20 cents per Mcf, the volumes of gas were to be calculated at a pressure base of 15.025 per square inch absolute (R. 73). By contrast, the volumes of gas under the 1947 contract were calculated at a pressure base of 16.7 pounds per square inch absolute (R. 45). In 1957, the rate actually in effect under the 1947 contract was 8.18 cents per Mcf, measured at the 16.7 p.s.i.a. pressure base (R. 60). This included tax reimbursement. This rate when converted to the pressure base of 15.025 p.s.i.a is 7.36 cents per Mcf.

venience and necessity authorizing the continuance of its sales to Southern then being made under the 1947 contract (R. 26). On the same date, the 1947 contract was filed as Sun's F.P.C. Gas Rate Schedule No. 55 (R. 32). On May 28, 1956, the Commission issued its certificate authorizing the continuation of the sales to Southern described by the 1947 contract, as well as the facilities employed in making such sales (R. 99–112).

Before the expiration of the existing 1947 contract, Sun sought to obtain certification for the allegedly new and distinct service to Southern under the 1957 contract (R. 115). At the same time, it tendered the new contract for filing as an "initial" rate schedule (R. 113). However, Sun neither applied for approval of abandonment of the sales under the 1947 agreement, pursuant to Section 7(b) of the Natural Gas Act (App., *infra*, pp. 54–55), nor gave notice of the termination or cancellation of its Rate Schedule No. 55, pursuant to Section 4(e) of the Natural Gas Act or Section 154.97 of the Commission's Natural Gas Act Regulations (App., *infra*, pp. 52–54, 63).

By letter-order dated September 12, 1957, the Commission rejected the application for a new certificate and the proffered initial rate filing (R. 123). The certificate application was rejected because it covered the precise acreage from which sales by Sun to Southern had been authorized on May 28, 1956, by the certificate which was still valid and outstanding (R. 123–124, 28). The 1957 contract was not accepted as an initial rate filing because "such proposed rate schedule duplicates sales from units covered by your existing FPC Gas Rate Schedule No. 55 and such proposed rate schedule embodies a change in the

effective rate for gas sales from such units" (R. 124). Sun was advised, however, that this rejection was without prejudice to the re-tender of the proposed rate, accompanied by the material required to be submitted in support of changed rates (R. 124).

Thereafter, petitioner applied for rehearing and at the same time filed its new contract, under protest, as a rate change (R. 87, 124). Reiterating its previous explanation, the Commission denied reconsideration on November 8, 1957 (R. 133). Concurrently, the proposed rate change was suspended and a hearing was set to determine the lawfulness of the increased rate (R. 136). Sun's application for rehearing of the suspension and hearing order was rejected as not addressed to a final order (R. 145).[2]

The court below, with Judge Brown dissenting, affirmed the Commission's orders in all respects. It held that where a new contract is made between the same parties for the same service as provided by the terminated contract, but at a higher rate, the new rate

[2] As noted in our brief in opposition (p. 3, fn), the Commission believes that a party is not entitled to immediate review of the order of the Commission setting for hearing and suspending the rate schedules filed as changes because such an order is procedural and interlocutory, see, *e.g.*, *Humble Oil and Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819 (C.A. 5), certiorari denied, 352 U.S. 967. Sun seeks review here of the November 8 hearing-and-suspension order as well as the September 12 letter-order rejecting its certificate application and rate schedule as an initial rate. Review of both orders involves the same questions. Since we do not challenge the reviewability of the letter-order of rejection, the issue relating to the reviewability of the hearing-and-suspension order is academic.

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is a rate change, not an initial rate, and hence subject to the suspension provision of Section 4 of the Natural Gas Act. The court also held that there was nothing to petitioner's contentions that, with respect to the 1947 contract, it had sought a certificate of limited duration or that the Commission intended to so limit the certificate issued on May 28, 1956 (R. 149–153).

SUMMARY OF ARGUMENT

I

Prior to the expiration in 1957 of the gas-sales contract pursuant to which petitioner Sun had been selling natural gas to Southern from certain reserves since 1947, Sun and Southern entered into a new contract which provided for the continuation of such sales for another twenty years, but at a higher rate. When Sun tendered the new contract to the Commission for filing as an initial rate, the Commission rejected the proffered filing because the higher rate constituted a changed rate which should have been filed in accordance with the provisions of Section 4(d) of the Natural Gas Act and the regulations relating to changed rates. It is only with respect to changed rates that the burden is on the seller to show that they are just and reasonable and that the Commission can order a refund of any portion found after hearing to have been unjustified. In our view, the Commission correctly ruled that the new rate was a changed rate required to be filed subject to suspension, rather than as an unsuspendible initial rate.

A. Petitioner's contrary argument is based on the erroneous premise that the Commission must regulate

each contract under which Sun serves Southern as a single unique event taken by itself, rather than regulating the continuing service or sales actually made pursuant to the contract. Under Section 4 and 5, the rate review provisions of Act, the Commission must determine the justness and reasonableness of rates for jurisdictional gas sales and transportation, and its regulation of particular contracts is incidental to that purpose. The statute manifests the Congressional understanding that, by making sales or transporting gas, natural gas companies render continuing services; and the provisions of Section 4 (d) and (e) are to be applicable to the continued selling or transporting of gas whether those services are rendered pursuant to contract or otherwise. See also the Commission's brief in *Sunray Mid-Continent Oil Company*, No. 335.

Sun's 1947 contract with Southern illustrates that sales of natural gas by producers are a continuing service, subject to Commission supervision. That contract, rather than constituting simply a sale of a "specific volume" or "batch" of gas, as petitioner would have it, plainly described a supply service, defining the seller's obligations and the buyer's rights in terms showing the importance of the readiness to serve or deliver gas on both a daily and an annual basis. In addition, the 1947 contract was not even a completed sale but only an agreement to enter upon a service. The agreement did not transfer or purport to transfer title to any of Sun's gas prior to delivery to Southern. Indeed, the quantity ultimately to be delivered could not be determined at the inception of

the contract since it was dependent on the needs of the buyer as they might vary from time to time.

B. The court below was plainly correct in affirming the Commission's determination that the service to be rendered under the new contract was a continuation of the service which Sun had rendered to Southern for ten years. Sun has conceded that, if its sales are a service, the service under the new contract is a continuation of that under the old. It is apparent from the face of the two contracts that the source of the gas sold on the expiration of the old agreement was identical with that sold under the new at its commencement; that the buyer and the seller are the same; and that both contracts provided for the same delivery facilities. In these circumstances, the higher rate of the new contract was a *change* in the rate being charged by Sun for an existing service. Hence, Sun was required to comply with the provisions of Section 4(d) of the Act, which prohibit a change in any jurisdictional rate unless a notice of change is given to the Commission and the public by the filing of a new schedule showing the changed rate.

C. Petitioner is also incorrect in its contention that its rate schedule, consisting of the 1947 contract and a supplement, automatically ceased to exist as a rate schedule when the private obligations of that contract terminated. For the purposes of the Gas Act, all provisions of a contract filed as a rate schedule are not self-operative, without regard to the notice-of-change provisions of Section 4(d). On the contrary, only those provisions of the contract which define the service and the price initially to be paid are the "rate"

in effect, within Section 4(e), while the other provisions of the contract filed as a rate schedule (such as those calling for automatic changes in price by escalation or favored-nation provisions, or for termination of service) are not. And while a contract may expire of its own terms as a contract, its existence as a rate schedule can be terminated only by compliance with the provision of Section 4(d). Here, Sun's 1947 contract, filed as its Rate Schedule No. 55, necessarily remained in effect on September 3, 1957, the date on which service was to continue under the new contract, since Sun had neither filed a notice of termination with respect to that rate schedule nor a new schedule to take its place in accordance with Section 4(d). The Commission's regulations make this clear, and the courts of appeals have consistently agreed with the Commission that, under the Natural Gas Act and its regulations, future rate changes contemplated by contracts filed as rate schedules can become operative only after statutory notice is given. By the same token, future service changes, such as a termination, are not self-operative. Accordingly, there is no merit to Sun's claim that its Rate Schedule No. 55 expired of its own force on the date of expiration of the 1947 contract, without any notice of termination or of change having been filed.

D. Sun incorrectly contends that the decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, in which this Court held that the Act did not permit a party to a rate contract *unilaterally* to abrogate that contract, compels the con-

clusion that its new contract rate was immune from Commission action except under Section 5 of the Act, and was therefore a non-suspendible initial rate. The claim is that, under *Mobile*, suspension of the changed rate is barred because suspension will delay the effectiveness of the new rate agreed to by the parties and also extend the effectiveness of the existing rate beyond the agreed-to date. *Mobile* plainly made no such ruling as to agreed-upon rates. If it had, the Commission's suspension power under Section 4, the validity of which was recognized in *Mobile*, would be rendered meaningless with respect to producers' contracted rates. For there is the same modification of the terms and effective dates agreed upon by the parties regardless of whether the change is agreed to at the beginning of a contract, as by a provision for future or periodic rate increases, or by negotiation of a new contract to succeed an expiring contract, as here. As petitioner recognizes, most producer rate changes are mutually agreed to by the contracting parties.

Such a result would fail to give full protection to consumers as to price—the primary purpose of the Act—since under Section 5(a), the only provision under which initial rates may be reviewed, the Commission can give only prospective relief from the imposition of unjust and unreasonable rates and charges. The relative inferiority of the protection accorded under Section 5(a) has recently been recognized by the Court. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

Moreover, as the decisions in *Mobile* and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Divi-*

sion, 358 U.S. 103, show, there is no merit to Sun's assertion that the Commission's action here gives no "meaning or sanctity whatsoever" to gas sales contracts. During the term of a producer-pipeline contract, which (as here) prohibits price changes not permitted by the contract, the contract effectively determines the maximum cost of gas to the pipeline purchaser and provides a seller, such as Sun, with an assured market for a period of years. After the expiration of the contract term, as *Memphis* shows, the producer, though subject to Commission regulation, is free unilaterally to initiate changes in rates or service. Thus, the length of the contract is of interest to producers and pipelines alike even though the obligation of the producer to serve is not automatically terminated by the expiration of its contract.

II

The Commission was also clearly correct in rejecting petitioner's application for a new certificate of public convenience and necessity since the certificate issued to Sun in 1956 already authorized it to make sales to Southern from the same reserves covered by its new application. The language of the earlier certificate shows that the authorization to make sales from Sun's Gwinville Field reserves was not limited to the duration of the contract pursuant to which service was initiated. Moreover, in its application for that earlier certificate, Sun sought a certificate "to authorize the continued sales by Sun" of its gas to Southern, not, as it now contends, authorization for a single "sale" at that time. This was no mistake

since, as we have shown, the 1947 agreement under which service commenced was not in fact a single "sale" but rather an agreement to supply Southern with a designated portion of that company's needs.

Even if there were doubt as to the meaning or scope of the authorization granted by the Commission in the 1956 certificate, the Commission's prior interpretations and practice would refute the contention that the 1956 certificate authorization was intended by the Commission to be restricted to the period covered by Sun's contract. Since the inception of the Act, the Commission had taken the consistent view that a natural gas company's statutory obligation to serve is not limited to the duration of its private contractual obligation. Certificates containing language identical to that used here had been construed, prior to petitioner's certificate, as not limited to the duration of any particular contract. There is no warrant for a different interpretation here. This is particularly so because the Commission, when it has intended to limit an authorization to a specific period, has expressly stated such a time condition.

In our brief in the companion *Sunray* case, No. 335, we also show that petitioner's further assertion that the Commission had no authority to issue a certificate of unlimited duration is equally without merit. And, even if Sun could be thought to have applied for a certificate of limited duration, it accepted the unlimited certificate issued without seeking judicial review and cannot now complain that the Commission should have issued a different type of certificate.

ARGUMENT

I

THE HIGHER RATE IN PETITIONER'S NEW 1957 CONTRACT PROVIDED FOR A CHANGE IN AN EXISTING RATE FOR THE SAME SERVICE AND WAS THEREFORE REQUIRED TO BE FILED UNDER SECTION 4(d) OF THE NATURAL GAS ACT

Starting in 1947, Sun, pursuant to a ten-year contract, sold natural gas to Southern from its reserves in the Gwinville Field, Mississippi. Prior to the expiration of this contract, Sun agreed to continue selling gas to Southern from those reserves at a higher rate under a new twenty-year contract. When Sun sought to file this new contract as an initial rate pursuant to Section 4(c) of the Natural Gas Act (App. *infra*, pp. 51–52), the Commission rejected this filing on the ground that it was a changed rate for the same sales and, accordingly, should have been filed in accordance with the provisions of Section 4(d) of the Act and Section 154.94 of the Commission's regulations (App., *infra* pp. 52, 60–62), relating to rate changes.

Sun contends that the Commission erred in not accepting the filing of the new contract as an initial rate. In this way it would avoid a more effective Commission regulation of this rate for, as a changed rate, the new contract rate was subject to the provision of Section 4(e) of the Act, pursuant to which the Commission, pending a hearing to determine justness and reasonableness of the changed rate, could and did suspend the new rate for five months and permit the rate to become effective thereafter subject to refund of any part found to be unjustified at the

conclusion of the hearing. Because the new rate is higher than the old, Sun would have the burden of proof at the hearing to show that the "increased rate * * * is just and reasonable." Section 4(e), App. *infra*, pp. 52–54. But, if the new rate is an *initial* rate, Sun would be entitled to receive and retain charges collected at that rate, even if unreasonable (without any chance of refund), until the Commission, acting under Section 5(a) of the Act (App. *infra*, p. 54), could investigate, conduct a hearing at which the burden of proof would be on it to show that the rate was not reasonable, and prescribe a reasonable rate for the future. This Court has noted the inferiority of the protection offered to consumers by that procedure. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 389–390. We shall show that there is no support in the language of the statute, the Commission regulations, or the policy and history of the Act, for petitioner's contention that its rate under the new contract is not a "changed rate" or an "increased rate", but an initial rate.

But it should first be observed that the Commission's determination that the new contract rate was a changed rate is not dependent on the duration of the original certificate authorization for these sales. Even if a limited-term certificate had been issued to Sun—which (as we show in Point II, *infra*, pp. 40–49) is not the case—so that Sun would have been free to abandon its service to Southern without further permission, Sun voluntarily entered into the second contract to continue its service and did not abandon it.

Accordingly, the rate and the certificate questions at issue here are to that extent separate and distinct. Sun could prevail in its certificate claim but nevertheless fail in its attempt to be free from Commission supervision of its rates under Section 4 (d) and (e) of the Act.

A. THE COMMISSION'S REGULATION, UNDER SECTION 4 (d) AND (e), OF GAS PRODUCERS' RATES IS NOT LIMITED BY THE DURATION OF THE CONTRACTS UNDER WHICH THEY SUPPLY THEIR GAS TO INTERSTATE PIPELINES, BUT IS BASED UPON THE FACT THAT A CONTINUING SERVICE IS PROVIDED

1. Sun's rate argument (Pet. Br. 38–47) seems to be grounded upon the erroneous premises that the Commission must consider each contract under which Sun serves Southern as a single unique event incapable of continuation; that the Commission does not regulate the *service* which is the subject of such contract or the rates charged (which are of course susceptible of continuation); and that such a contract for a specified number of years is a "sale" of a "specific volume" (Pet. Br. 44) or "batch" (Pet. Br. 47) of gas to which Commission rate regulation is confined in isolation, and not an agreement for the performance of a supply service which, once started, is the subject of continuing rate regulation and may continue independently of the parties' contract.

But it is clear that, under Sections 4 and 5 of the Act, the Commission regulates the "rates and charges" for jurisdictional gas sales or jurisdictional transportations—which the Act refers to generically as "services"—whether such rates and charges are provided for by one or successive contracts or estab-

lished *ex parte* by the seller. It is the operation of supplying or carrying gas which is significant, not the particular legal relationships. Section 4(c) of the Act requires the filing of:

> * * * schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

The rates required to be filed are for actual jurisdictional sales or transportation. If no gas is ever delivered under a contract such as those between Sun and Southern, the contracted rate will never be charged and the filing requirement will never attach. Under Section 1(b) of the Act (App. *infra*, p. 51), Commission jurisdiction over rates and charges does not attach until there is a sale at wholesale or transportation in interstate commerce, and this does not occur unless and until there is a flow or movement of gas in interstate commerce. See *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378, 388–389.

Moreover, the phrase "such * * * services" at the end of Section 4(c) necessarily refers to any "transportation or sale subject to the jurisdiction of the Commission" since there is no other antecedent to which it can refer. This makes doubly clear that, when Congress speaks of a sale or transportation, it is not referring to a single, isolated, individual, or unique event, nor simply to a legal relationship, but to a continuing process of selling or transporting—not to

the sale or transportation of an identified "batch of gas", but to a continuing service.

The general context of the crucial word "service" in the Act is supplied by Section 1(b) (App. *infra*, p. 51), which provides that the "Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale * * * and to natural-gas companies engaged in such transportation or sale * * *" (with qualifications not now material). When the word "service" is used, even without a special immediate context, it refers generically to the transportation and sale to which Section 1(b) provides that the Act shall apply. Thus, Section 7(b) of the Act forbids abandonment of jurisdictional facilities "or any *service* rendered by means of such facilities, without the permission and approval of the Commission" (emphasis added) and makes the standards governing such approval not the expiration of the contract to sell, but the depletion of the supply of natural gas or the public convenience and necessity. See the Commission's brief in *Sunray*, No. 335, at pp. 24–49. So also the last proviso of Section 7(c) and Section 7(g) both use "service" in obvious reference to jurisdictional transportation or sale.[3] And, as we point out in No.

[3] When in 1954 Congress enacted the Hinshaw Amendment (Section 1(c), *infra*, p. 51) exempting transportation, or sale for resale, in interstate commerce wholly within the consuming State, it adopted the same generic term "service" to describe the exempted transportation or sale in providing for "[a] certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and *service* * * *" (emphasis added).

335 (pp. 18–24), that a sale at wholesale price by a natural gas company necessarily encompasses the rendering of a service is also shown by Section 7(e) (App. *infra*, p. 56). Under that section, a prerequisite to issuing any certificate is that an applicant is "able and willing properly to do the acts *and to perform the service proposed* * * *" (emphasis added). Since a certificate under Section 7(c) is required before a sale at wholesale price may be made in interstate commerce, whether or not pipeline transportation is involved (see *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672), the sale and delivery of gas by a producer must constitute a service within the meaning of the Act.

2. Sun's 1947 contract with Southern (R. 32–50) itself illustrates the continuing *service* nature of the industry activities regulated by the Act. The contract does not simply designate any "specific volume" (Pet. Br. 44) or "batch of gas" (Pet. Br. 47), as Sun's brief would have it. Rather, it goes to considerable pains to define the service to be rendered and to state the seller's obligations and buyer's rights in terms which show that readiness to serve is an important element. Article IV, filling almost five pages of the printed record, deals with "Quantities of Gas." Southern agreed annually to take or pay for at least 20% of the gas it needed in operating its pipeline system as it was then constituted, "or as same may be enlarged, extended or expanded," from the Gwinville Field (R. 35). On six months' notice Southern had the option to increase that minimum to 30%.

Contract language could scarcely be plainer than the

"daily take" provision that a continuing service was to be provided ~~provision~~ (R. 36):

> Buyer shall have the right to take and purchase from Seller hereunder at any time, and from time to time, a daily quantity of gas equal to one hundred fifty per cent (150%) of the minimum in effect on the date of purchase * * * from Seller hereunder. * * *

There follow provisions for taking a "reasonable quantity of gas during each calendar month" from each connected well; for the taking of gas "at as uniform a rate as is possible" (R. 37); for reduction of the minimum take if it does not appear reasonably certain that seller will be able to deliver the quantities provided for in the following 3 years (R. 38–39) and that (R. 39):

> * * * Seller shall not be obligated to produce its wells * * * at a rate which in Seller's opinion will be detrimental to the ultimate recovery of gas from Seller's lands and leaseholds in the field. * * *

That the 1947 contract was not solely a sale of gas, but was rather an agreement to enter upon a service, is also shown by the fact that the agreement did not transfer or purport to transfer title to any of Sun's gas to Southern. See, *e.g.*, 1 Williston on Sales, § 1; Uniform Sales Act, § 1. Thus, Sun remained in "control and possession" of the gas and responsible therefor until delivery (R. 34). The contract expressly provides that Sun was not purporting to dedicate to Southern any specific portion of its gas reserves in Gwinville Field (R. 46). And, as we have seen, the quantity of gas to be sold was not definitely fixed at

the date of the agreement, but depended on the buyer's needs.

3. All these factors show that the 1947 agreement did not constitute a single "sale" (as that term is used in the Natural Gas Act), but an agreement to provide a service—a continuing series of sales—and they explain why Section 4(c) requires rates for sales to be filed, but contracts, as such, to be filed only to the extent that they may "affect or relate to such rates * * * and services." While, as the petitioner states (Br. 21), a sale is a contract, it does not follow, contrary to Sun's suggestion, that every contract to sell is also a jurisdictional sale, or conversely that a jurisdictional sale under this Act is nothing more than the bare contract.

The important factor is that the producer has continued and is continuing to supply gas in interstate commerce. If that is so, the Commission has continuous authority under the Act to regulate the producer's rates and service—whatever the form its legal relationship with the buyer may take. Certainly, if Sun had for a decade been selling to Southern without a formal contract but in a series of day-to-day "sales," an increase in Sun's rates comparable to that provided here in the 1957 contract could not be said to be beyond the Commission's review authority because the new rates were embodied in separate new "sales." Similarly, in the present case, it makes no difference to the Commission's authority that the old contract for a ten-year term has expired and a new one for ten years has been made—at least so long as the new con-

tract envisages continuity of the same service performed in the past.

The basis in the Act's policy and history for Congress's clear concern with the continuity of service is discussed more fully in the Commission's brief in the companion case, *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, No. 335, at pp. 18–36. The various terms of the Act—including the critical terms "sale" and "service"—must be read in the light of this general legislative purpose to give to the Commission, and not to the producer or the pipeline, the authority to determine when and upon what terms service shall be continued or terminated.

B. SALES UNDER THE NEW CONTRACT CONSTITUTED A CONTINUATION OF THE SERVICE RENDERED UNDER THE 1947 CONTRACT SO THAT THE INCREASED RATE WAS A CHANGED RATE SUBJECT TO FILING UNDER SECTION 4(d) OF THE ACT

1. The court below was clearly correct in holding that the new contract between petitioner and Southern provided for a continuation of the *service* which Sun had rendered for ten years (R. 150). Sun's basic answer (Br. 44–46) is that it was not rendering a service at all under either contract. Its statement that "the contracts [did not] constitute the 'same' service" (Br. p. 45) is obviously beside the point since it is not the contracts themselves but the performance thereunder which constitutes the service. Indeed, Sun recognized this in the court below; it conceded there (Br. for Pet. in C.A. 5, No. 17040, p. 31) that, if its performance under the first contract were regarded as a service, the second contract merely provided for a continuation of that service:

> * * * Moreover, if we assume, *arguendo,* without admitting that Sun's first sale must somehow be broadly construed as a "service," there has been no proposed abandonment of such "service" because Sun's second contract, rather than an abandonment, is a continuation of "service" to the same pipeline company from the same gas field. * * *

This concession was, of course, compelled by the record, for it is not questioned that gas from the same source would move through the same set of pipes and valves at the same points into Southern's lines under the new contract as under the old. Nor is there even any contention that the new contract dedicated gas from new or additional reservoirs to the Southern sales. These facts are evident from the two agreements filed with the Commission. In the agreement of August 26, 1947, it was stated under the heading of "Gas Sold and Purchased" that (R. 33)—

> * * * this agreement shall apply to all merchantable natural gas that may be produced from all wells now drilled or which may hereafter be drilled on all lands and leaseholds now or hereafter owned by Seller located in the Gwinville Gas Field as now defined, or as it may be extended, and all of Seller's proportionate part of all merchantable natural gas that may be produced from unitized or pooled lands and leaseholds owned or controlled by Seller, and the proportionate part of such gas which belongs to other owners and leaseholders in such unitized or pooled lands and leaseholds which Seller has or shall hereafter from time to time have the right to market * * *.

The contract between Sun and Southern dated August 1, 1957, provides under the heading "Gas Sold and Purchased" that (R. 63)—

> * * * this agreement shall apply to all merchantable natural gas produced from leases now or hereafter * * * owned by Seller in said Field and Seller's proportionate share of all gas produced from lands, leases and production units owned by Seller and others, jointly. * * *

"Field" is defined as (R. 62)—

> The area in Simpson and Jefferson Davis Counties, Mississippi, known as the Gwinville Gas Field as the same Field is presently defined or as the same may be entered by wells which hereafter may be drilled.

Both the old and the new contracts provided for the sale of gas produced from all leaseholds held by Sun or in which it had an interest within Gwinville Field. Thus, the source of the gas sold on the expiration date of the old agreement was identical with the source of the gas to be sold under the new agreement. Moreover, the buyer is the same, and the new contract does not provide for any facilities not provided for under the old contract (R. 34, 71). These factors demonstrate that the 1957 contract on its face called for a continuation of the same jurisdictional service as that rendered under the 1947 contract.

2. In these circumstances, the Commission was clearly correct in treating the higher rate agreed upon in the new contract as a changed rate required to be filed pursuant to Section 4(d) (App., *infra*, p.

52) rather than as an initial rate for a service not previously rendered. Section 4(d) provides in pertinent part that:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force * * *.

The term "any such rate" refers to the "rates and charges for any transportation or sale subject to the jurisdiction of the Commission" mentioned in the preceding section, Section 4(c). This "sale," as we have seen (*supra*, pp. 15–23) is not an isolated contract but the continuing *"service"* actually provided. If a higher rate is sought to be charged for the same performance as that which the seller has long rendered to its purchaser, the schedule reflecting that higher rate, although embodied in a new contract, must be filed under Section 4(d) as a "changed" rate, and, if suspended by the Commission, justified by the seller as an "increased rate" under Section 4(e).

This result is unaffected by the fact that the second contract may provide for some variations in the terms of service, for Section 4(d) expressly contemplates that the service, as well as the rate, may be changed, and prescribes the same procedures for both. Since service by natural gas companies is almost always

rendered pursuant to a contract, Section 4 (d) and (e), and the related hearing, suspension and refund powers, would largely be rendered meaningless if a mere variation in the terms of service were automatically to constitute the initiation of a *new* service. Whether or not a contract has instituted a new service justifying an initial rate filing must depend on the facts of the particular case, and it would be difficult to adopt a hard and fast rule. For this reason, we need contend no more than that on the facts of this case—where there has been no change in the physical facilities, source of the gas, or the buyer—the Commission and the court below were entirely correct in concluding that the same service, in a jurisdictional sense, was continued by the second contract, and that, accordingly, the higher rate provided for by the new contract was a changed rate, not an initial rate for a new service.

C. UNDER SECTION 4 OF THE ACT AND THE COMMISSION'S REGULATIONS, A RATE SCHEDULE CAN BE TERMINATED ONLY AFTER A NOTICE OF CHANGE IS FILED PURSUANT TO SECTION 4(d)

1. Petitioner, after arguing that its 1947 contract was a single "sale," contends (Br. 40) that, when the Commission accepted the contract for filing as a rate schedule, all of the provisions of the contract, including the termination date, became self-operating parts of the rate schedule without regard to the provisions of Section 4(d) of the Act, which requires natural gas companies to file notices of changes in any jurisdictional rate, charge, or service. From this contention, Sun concludes (Br. 40–41) that the rate schedule consisting of the 1947 contract automatically ceased to exist at the end of the contract term when the new

1957 contract was to become effective as a rate schedule, so that the latter could not be a change in a subsisting rate schedule.

This contention completely ignores the Commission's regulations under which those contract provisions defining the service and the price to be paid for it initially are the "rate," while other provisions of the contract, such as those for later automatic changes in price, or for termination of service, are not. That is, the contract not only embodies the rate in effect at the time the Commission jurisdiction attaches and as such constitutes the filed rate schedule, but in addition it is also a contract relating to or affecting such rate which, as such, must also be filed under Section 4(c). While the contract may expire of its own terms as a contract, its existence as a filed rate schedule can be terminated only by compliance with the provisions of Section 4(d). Accordingly, Sun's 1947 contract, which it filed as its Rate Schedule No. 55, did not terminate as a rate schedule merely because the contract term expired, but remained in effect on September 3, 1957, when service would continue under the new contract, since petitioner had not filed a notice of termination with respect to its Rate Schedule No. 55.

The Commission's regulations, as well as its administration of the Act since its inception, make this clear. The rate schedule for independent producers is defined by Section 154.93 of the Commission's regulations (*infra*, p. 60) to mean

> * * * the basic contract and all supplements or agreements amendatory thereof, effective and

applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Under this definition independent producers are permitted to file their contracts as their rate schedules, instead of filing tariffs providing for uniform rates for comparable services as previously required of all natural gas companies, and still required of natural gas companies other than independent producers (18 C.F.R. 154.1–154.86).[4]

[4] Prior to the adoption of its tariff-service agreement regulation in 1948 by Order No. 144 (13 F.R. 6371, 6838) (see *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103), "rate schedule" under the Natural Gas Act for all natural gas companies alike was defined as the sales contract and supplements thereto. See Commission Order No. 141, Section 154.1, 12 F.R. 8461.

Under Section 205 of the Federal Power Act, 16 U.S.C. 824d, which is virtually identical to Section 4 of the Natural Gas Act, the Commission's definition of rate schedule for electric utilities is as follows (Section 35.1 of the Commission's regulations, 18 C.F.R. (1949) 35.1):

> The term "rate schedule" as used in §§ 35.1 to 35.20, inclusive, shall include and mean any contract, agreement, lease of facilities or other writing, including supplements thereto, which specifies or affects the rates and charges to be assessed or collected for the transmission or sale of electric energy subject to the jurisdiction of the Commission, or which establishes any rule, regulation, classification, or practice affecting such rates and charges or the service rendered or to be rendered.

This definition has remained unchanged since it was adopted in 1938 (Commission Order No. 50, Section 35.1, 18 C.F.R.

Section 154.94(c) of the Commission's regulations (App., *infra*, p. 61) shows that contract clauses for subsequently changing the initial rates or services are not effective as rate filings:

> The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

Any such subsequent change must, therefore, be separately filed as a change pursuant to Section 4(d) of the Act and Section 154.94(a) of the Commission's regulations, *infra*, pp. 60-61, and under Section 154.94 (b) of the regulations, *infra*, p. 60, all changes must be filed not less than 30 and not more than 90 days before the proposed effective date of the change. Section 154.97 of the regulations, *infra*, p. 63, also specifically provides that when a rate schedule as such "is proposed to be cancelled or is to terminate by its own terms and no new rate schedule" is to be filed in its place, the filing company shall give the Commission notice at least 30 days prior to the proposed effective date of the termination, together with a statement showing the reason for the cancellation or termination. Elsewhere, the Commission has expressly provided that a termination is a change (Sections 2.4 and 2.52 of the Commission's regulations, 18 C.F.R. (1949) 2.4 and

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(1939) 35.1) and is virtually the same as that under the Natural Gas Act prior to adoption of the tariff-service agreement regulations in 1948.

2.52, *infra*, pp. 58–59). This Court has approved that construction in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 423–424, discussed *infra*, pp. 31–33.

In this way, the regulations assure the continued existence of a rate schedule after the expiration of the underlying contract, at least until the natural gas company takes steps to cease the service to which the rate schedule applies.[3] That the Commission has relieved independent gas producers of the burden of restating on a separate document (called a "rate schedule") those terms of their contracts in effect at the date service is to commence does not change the fact that the Commission was free to treat, and has treated, only presently effective parts of a contract as the statutory rate schedule.

2. The courts of appeals have consistently agreed with the Commission that, under the Natural Gas Act and its regulations, rate changes contemplated by contracts filed as rate schedules are not self-executing and can become effective only after compliance with the

[3] The original rules of practice and regulations under the Natural Gas Act, Commission Order No. 52, 3 F.R. 1681, effective July 11, 1938, did not specifically state that periodic or future changes were not self-operative. By order of December 20, 1938, however, the Commission required natural gas companies having on file with the Commission agreements providing for changes to become effective at a future date to give thirty days' notice of the changed rate or service pursuant to Section 4(d) of the Act and the Commission Order No. 59, 4 F.R. 1185. The original rules and regulations required natural gas companies to give thirty days' notice prior to the termination date of a rate schedule. Commission Order No. 52, Section 54.13, 3 F.R. 1688.

notice provisions of Section 4(d). In *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 121 F. 2d 159 (C.A. 8), the court affirmed the Commission in suspending, as changes, increased rates provided by price escalation clauses in contracts filed as rate schedules. In *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F. 2d 388 (C.A. 5), certiorari denied, 332 U.S. 770, the court held that, after passage of the Natural Gas Act, favored-nation clauses ceased to be self-operative and that the rates provided thereby could become effective rates only after filing in accordance with the Act.

Similarly, in *Bel Oil Corp.* v. *Federal Power Commission,* 255 F. 2d 548 (C.A. 5), certiorari denied, 358 U.S. 804, the Fifth Circuit rejected contentions that an increased rate agreed upon in a contract escalation clause need not be filed as a change. This case is also of interest because, prior to the date of the contracted increase, no rate schedule had as yet been filed in compliance with the *Phillips* decision, so that there was no rate schedule on file when the escalated price was to become effective. See also *Gulf Oil Corp.* v. *Federal Power Commission,* 255 F. 2d 556 (C.A. 5); *Sun Oil Co.* v. *Federal Power Commission,* 255 F. 2d 557, 559 (C.A. 5), certiorari denied, 358 U.S. 804.[6]

[6] Petitioner, in attempting to distinguish the *Mississippi Power & Light Company* and *Bel Oil* cases from the present situation (Br. 43–45), relies basically on its erroneous view that its earlier rate schedule had expired. But the *Bel Oil*, *Gulf Oil*, *Sun Oil*, and *Cities Service* cases, cited in the text, could not, in any event, be distinguished on that ground since there had been no previous rate-filing in those cases.

In *Cities Service Gas Producing Co.* v. *Federal Power Commission,* 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911, the suspension of an increase under a clause of a contract in effect on June 7, 1954, was sustained. The independent producer's rate first tendered for filing after the *Phillips* decision on June 7, 1954, was set out in letters between seller and purchaser dated June 14 and August 24, 1954. The rate was an increase under a "prevailing field price" adjustment clause over the rate provided in the original contract of April 30, 1953, as previously adjusted on December 23, 1953, and as being collected on June 7, 1954. But prior to the tender of the increased rate of June 14 and August 24, no rate had been filed by the producer. Nevertheless, the Tenth Circuit held the attempted increase invalid and ineffective for failure to comply with Section 4(d). See also the recent opinion of Mr. Justice Reed in *Episcopal Theological Seminary* v. *Federal Power Commission,* 269 F. 2d 228 (C.A.D.C.), certiorari denied *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission,* 361 U.S. 895.

Thus, since the inception of the Gas Act, both the Commission and the courts have recognized the applicability of Section 4(d) to *rate* changes provided for by contracts, where those contracts have been filed, or subject to filing, as initial rate schedules. No reason has been suggested why the same notice requirements are not equally applicable to *service* changes including termination of service, as here. In fact, this Court has declared that they are, in a case involving electric rates under Section 205 of the Federal Power Act, 16 U.S.C. 824d, which is

virtually identical to Section 4 of the Natural Gas Act. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 423–424. It was there held that the termination of contractual obligations between parties does not permit cessation of a service previously rendered under a contract, except by complying with the notice requirements of the statute and the Commission's rules. The seller argued that its sales contract had been held illegal and unenforceable under the antitrust laws in a recent decision in another case and was, therefore, a nullity; that it could not be compelled to continue service in the absence of a valid contract; and that in those circumstances the Commission improperly fixed a rate for the service which had been defined by that contract notwithstanding its invalidation 343 U.S. at 421). In response to the seller's argument that it could discontinue its service, the Court stated (343 U.S. at 423–424):

> If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. Shortly after Part II of the Power Act was passed in 1935, Penn Water, as required by § 205(c), filed with the Commission the contract here attacked and then designated by the Commission as "Penn Water's Federal Power Commission Rate Schedule No. 1." Section 205(d) provides that "no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public." Here instead of following the procedure for changing existing services and practices—a procedure

which the Congress has authorized and which the Commission has supplemented by rules of its own—the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order.

So here, Sun may not assert that its Rate Schedule No. 55 expired of its own force, but must follow the procedure prescribed by the corresponding provisions of the Gas Act, *i.e.*, Section 4 (d) and (e), and the Commission's rules supplementing those provisions.

D. THIS COURT'S DECISIONS DO NOT IMMUNIZE RATE INCREASES EMBODIED IN "NEW" CONTRACTS FROM COMMISSION REVIEW UNDER SECTION 4(d)

Sun urges (Br. 41–44) that even if the language of Section 4 did not compel the Commission to accept the new contract as an initial filing, this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, did so, because, it says, that opinion shows that a natural gas company's contracts are wholly inviolate and free from all review except under Section 5. Such a construction of *Mobile* is untenable. The contract "interference" charged in this case is that suspension of the changed rate (in the 1957 contract) will delay the effectiveness of that higher rate as contracted for and will extend the effectiveness of the previously contracted rate beyond the date agreed upon by the parties. Of course, this is no different or greater interference than is necessarily involved if the suspension power is ever to be given effect where the parties have a continuing contract.

The *Mobile* decision tends to refute, rather than to support, Sun's argument, for while the Court, observing that the Act "evinces no purpose to abrogate

private rate contracts as such" (350 U.S. at 338), held that Section 4(d) did not permit natural gas companies to file rate changes *prohibited* by the terms of their contracts, it nevertheless noted that the review proceeding under Section 4(e), in which the Commission is given interim suspension power, remained, "like a § 5(a) proceeding, simply a review by the Commission of a rate established by the natural gas company". 350 U.S. at 343. *Mobile* recognized the Commission's authority to review any *contracted* change in a contracted rate or service, and to suspend the change pending hearing, as provided for in Section 4(e). The Court found that Section 4(d), in requiring notice of changes, imposed a prohibition on natural gas companies and did not grant them a power to act in *abrogation* of their contract obligations. It emphasized that the Natural Gas Act, unlike the Interstate Commerce Act, contemplates the establishment of rates by individual contracts. And it pointed out that the conclusion that the Natural Gas Act did not empower natural gas companies *unilaterally* to change their contracts supported the purposes of the Act by insuring a continuity of supply at a relatively stable rate (350 U.S. at 344):

> * * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor

> can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate. * * * On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

Thus, the decision in *Mobile* was not that private contracts, pursuant to which relations in the natural gas industry are normally adjusted, are not subject to regulation at all. Rather, the Court held only that, to achieve the purposes of the Act, it was not necessary to permit natural gas companies *unilaterally to abrogate* the terms of their contracts through use of the filing and change provisions of Section 4.

When the scope of the *Mobile* ruling came before the Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, the Court was at pains to make it clear that the integrity of contracted rates was subject to the "overriding authority of the Commission" to reduce rates found unreasonable and, specifically, to delay the earliest effectuation of contracted rate changes, if necessary to permit Commission review (358 U.S. at p. 113–114):

> * * * This concern was surely a proper one for Congress to take into account in framing

> its regulatory scheme for the natural gas industry, cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, and we think that it did so not only by preserving the "integrity" of private contractual arrangements for the supply of natural gas, 350 U.S., at 344 (subject of course to any overriding authority of the Commission), but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes *consistent with appropriate Commission review* [emphasis added].

The Court was called upon to determine whether, under *Mobile*, a natural gas company could file an increased rate under Section 4(d) where the purchaser had agreed to the filing but not to the specific rate filed. It held that the filed-rate procedure did not require bilateral agreement on the specific rate change. Particularly significant here is the fact that, in *Memphis*, the entire Court accepted the principle that agreed-upon changes in rates could be filed pursuant to Section 4(d); indeed, the three dissenting Justices believed that the procedures of Section 4(d) were available only in the event of such mutual agreement on a specific rate. That, of course, is precisely the situation in this case.

Once it is recognized that the suspension power of Section 4 applies to agreed-upon changes, it is inescapable that suspension of such a change may modify the terms and effective dates agreed upon by the parties. For such a modification by suspension results regardless of when the change is agreed to by the parties—whether at the beginning of the contract

by inclusion of escalation or favored nation clauses or, as here, by negotiation of a new contract to succeed an expiring contract. The fallacy of Sun's argument in this respect is demonstrated by its attempt to distinguish the cases relied upon below which had held that changed rates provided for by escalation or favored-nation clauses were subject to the notice procedures of Section 4(d) and therefore suspendible. These cases are different, we are told, because there the new rates were clearly changes. Yet despite the fact that in those cases the same type of contract modification as here resulted from a five months' suspension by the Commission, in this case Sun argues that the new rate must be an initial rate because suspension would modify the terms agreed upon by the parties.

Sun's position would obviously permit natural gas companies to escape, by contract, the Commission's review jurisdiction under Section 4(e), for, under *Mobile,* unilateral increases not permitted by contract must be rejected by the Commission. If Sun were correct, no mutually agreed-upon rate—which would mean most producer rate changes—would constitute a changed rate within Section 4(d). Such a result would not only ignore the consistent practice of the Commission, approved by the courts, *supra,* pp. 26–33, but, of even greater significance, it would not give "full protection coverage to the consumer as to price," the primary purpose of the Natural Gas Act. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 388, 389; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591.

This would be so because under Section 5(a) of the Act (the only provision under which initial rates may be reviewed) the Commission can give prospective relief only. As observed recently in *Atlantic Refining Co.* (360 U.S. at 389), gas purchasers "have no protection from excessive charges collected during the pendency of a § 5 proceeding," and receive inferior protection under that Section for the further reason that "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appear nigh interminable."

The ruling in the *Atlantic Refining Co.* case also tends against Sun's position here. The Court there concluded that in a certificate proceeding the initial price must be given most careful scrutiny and, if necessary, be conditioned so that the consumer would be protected as effectively as he would be under the changed-rate procedures of Section 4(e). Significantly, the Court stated that the imposition of a rate condition in a certificate proceeding would not interfere with contract rights, contrary to *Mobile* (360 U.S. at 391-392):

> * * * [such a condition] is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity * * *. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties.

> Rather, it conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. * * *

The Court's decisions in *Mobile* and *Memphis* also show—contrary to petitioner's statement (Br. 47) that the Commission "has here held, in effect, that the provisions of a gas sales contract between a producer and a buyer, which relate to both quantity and delivery terms, have no meaning or sanctity whatsoever"—that gas sales contracts have very real legal and economic significance notwithstanding the conclusion that abandonment or change of service requires Commission approval. *Mobile* shows that a producer may not file a changed rate under Section 4(d) if such a change is not provided for by its sales contract. The Sun-Southern contracts are typical of producer gas sales contracts in that they provide for periodic price escalations (R. 46, 77). Such a contract effectively determines the maximum cost of gas to the pipeline purchaser,[7] although the rates filed by a producer pursuant to contract are subject to Commission decrease after review as to their justness and reasonableness. And *Memphis* shows that, after the contract expires, the producer, while still obligated to sell, is free to file changes in rates or service pursuant to Section

[7] In the absence of a finding under Section 5(a) of the Act, *infra*, p. 54, that a contract rate is "so low as to adversely affect the public interest," the Commission has no power to modify the contract rate, even if the producer made a bad bargain. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355.

4(d) at will, since there is no longer any contractual inhibition on such filings. See *Memphis*, 358 U.S. at 113–114. Accordingly, the contract assures a producer of a market for at least the years of its duration and the rate provisions provide a substantial measure of assurance that the pipeline's cost of gas will not exceed a fixed level. In the absence of a contract such as those involved here, neither of these assurances would exist; producer-pipeline contracts are therefore mutually beneficial. These considerations explain the willingness of both Sun and Southern to enter into a new twenty-year contract for continued gas sales as well as the importance to the producer of producer-pipeline contracts under which a service is to be rendered even though the obligation of the producer to serve is not terminated by the expiration of its contract.[8]

II

PETITIONER'S APPLICATION FOR A NEW CERTIFICATE AUTHORIZING THE SALES COVERED BY ITS 1957 CONTRACT WAS PROPERLY REJECTED SINCE THE REQUESTED AUTHORIZATION EXISTED UNDER THE PREVIOUSLY ISSUED AND EXISTING CERTIFICATE

A. Sun contends that the Commission also erred in rejecting its application for a certificate of public convenience and necessity authorizing its continued sales to Southern from the Gwinville Field pursuant to the contract which was to become operative on September 3, 1957. As the court below held (R. 151), the Commission was clearly correct in rejecting that application because the certificate issued May 28, 1956

[8] See also the Commission's brief in *Sunray*, No. 335, at pp. 38–47.

(*supra*, pp. 3–4, 21–23), already authorized the making of such sales. That certificate and the application requesting its issuance show without question that the Commission did not intend to issue a certificate of limited duration and that Sun did not request a time limitation.

As Sun has expressly recognized (Reply to Brief in Opposition, p. 3), the scope of the certificate issued to it on May 28, 1956, must be determined from an examination of the language of that certificate. It authorized "the sale by Applicant of natural gas in interstate commerce for resale * * *" as described in the order and in the certificate application and accompanying exhibits (R. 109–110). That the Commission was authorizing the physical acts or deliveries encompassed by any sales to be made pursuant to the contract, not authorizing the contract itself, is made clear by the following portions of the order granting the certificate (R. 110):

> (C) The certificate is not transferable and shall be effective only so long as Applicant *continues the acts or operations hereby authorized* in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.
>
> (D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the *service* herein authorized * * * [emphasis added].

These portions of the order show that the Commission did not uthorize sales or service by Sun only for the remainder of the contract term. And the Commission's understanding that it was authorizing a series of sales or a service—not a single limited sale—is also demonstrated by other portions of the order. In the first two paragraphs, the Commission expressed its belief that the sales would involve the rendering of service (R. 102):

> Each of the above Applicants has filed an application for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, authorizing Applicants to render *services* as hereinafter described, subject to the jurisdiction of the Commission, all as more fully represented in their respective applications which are on file with the Commission and open for public inspection.
>
> Applicants produce and sell natural gas * * * [emphasis added].

As the court below held (R. 151), there is nothing in the language of the certificate even to suggest that the authorization for Sun to render the service described was limited to the duration of the 1947 contract. The service described consisted of the acts or operations involved in the sale of gas by Sun to Southern from Gwinville Field. The Commission specifically stated, as we have noted, that the "certificate * * * shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act" (R. 110).

There is no merit to Sun's contention (Br. 27–29) that, by authorizing "the sale" of gas by Sun, the Commission intended to treat all of the separate sales that might be made under the contract as "the [one] sale," and to treat its authorization accordingly. As we have discussed, *supra*, pp. 15–21, the Commission's rate regulation is directed to the service rendered and rates charged therefor, not primarily to the contracts for that service. Under Section 7 (c) and (e), natural gas companies must seek Commission authorization for the acts or operations of making such a sale in interstate commerce. In this case, the acts or operations authorized were the separate acts of selling gas by Sun to Southern from its Gwinville Field reserves. The 1947 contract of sale, even if loosely considered a "sale," would not in itself be such an act or operation.

Indeed, Sun's certificate application refutes its present argument that the 1947 contract was a single sale or even that all the deliveries pursuant to the contract were "a sale". If Sun had in fact desired a certificate limited in duration to the period of the 1947 contract of sale it would have been simple to say so explicitly; but it did not.[9] While the contract was in

[9] In contrast, Sunray Mid-Continent Oil Company, petitioner in No. 335, has insistently made express requests for certificates of limited duration by seeking authorization to make sales "only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time" (R. 23–24 in No. 335, this term; R. 18–19 in No. 814, Oct. Term 1956.

existence for ten years, Sun at no point in its application stated that it sought a certificate for that period only. Instead, it merely sought a certificate "to authorize the continued sales by Sun of its gas" to Southern (R. 26), which had been commenced under its 1947 contract prior to this Court's decision in *Phillips, supra,* on June 7, 1954, and it indicated that it was seeking authorization only for "the sale of natural gas in the circumstance above described" (R. 29). Sun's reference in its application to continuing its sales is inconsistent with its present claim that it regarded the contract as one sale. And Sun's reference to "sales" in its application was clearly not a mistake, for, as we have shown in Point I, *supra,* pp. 18–20, the 1947 contract was not a sale as such, but merely an agreement to supply Southern with a designated portion of that pipeline's annual line requirements, provided the amount of gas called for was available from Sun's Gwinville Field reserves.

B. If there were any question as to the meaning of the words used in the certificate issued to Sun, it would be dispelled by the prior interpretations and practices of the Commission. Thus, on July 25, 1955, nine months before Sun's certificate was issued, the Commission had refused to issue a certificate of limited duration to an independent producer which

---

Similarly, Stanolind Oil and Gas Company (now Pan American Petroleum Corporation) in its certificate application filed October 4, 1954, in Commission Docket No. G–4063, asked "that said Certificate provide for the expiration thereof simultaneously with the expiration of said gas sales contract, and authorize Applicant to cease said sale at said time."

had specifically requested a certificate providing for its own expiration upon the expiration of the filed gas sales contract. *Sunray Oil Corporation,* 14 F.P.C. 877, 878.[10] There, as here, the certificate was to "be effective only so long as Applicant continues the acts or operations hereby authorized * * *."

This language, which is standard in Commission certificates, was also used in the grandfather certificate issued in 1945 to Panhandle Eastern Pipe Line Company (4 F.P.C. 1081). The certificate covered Panhandle's sales of gas for resale to Michigan Consolidated Gas Company under fifteen year contracts that expired in 1951. When Panhandle sought partially to abandon its service to Michigan Consolidated in 1951, the Commission found, *inter alia,* that the mere expiration of the contracts did not permit such abandonment of service. *Panhandle Eastern Pipe Line Co.,* 11 F.P.C. 167, 172, vacated for reconsideration on other grounds, *sub nom. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 204 F. 2d 925 (C.A. 3).

Thus, prior to the issuance of petitioner's certificate in May 1956, there had been two specific determinations that certificates containing language identical to that relied upon here were not of limited duration. It is true that in the *Sunray* case, *supra,* the Commission had held that it did not have the power to issue a certificate for a limited term and that the

[10] The Commission's refusal to grant a limited-term certificate, on the ground that it lacked power to do so, was affirmed on other grounds in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 239 F. 2d 97 (C.A. 10), reversed and remanded, 353 U.S. 944.

ruling of the Commission was reversed by the Tenth Circuit. However, this reversal post-dated the issuance of the certificate to Sun and does not affect the intent of the language used by the Commission in issuing the certificate.

Sun's contention that the Commission intended to issue a certificate limited to the term of its contract is also inconsistent with the fact that, since 1942, the Commission had expressed its view that the expiration or termination of a contract did not, in itself, constitute grounds for abandonment. *E.g., United Gas Pipe Line Company,* 3 F.P.C. 3. See also the discussion in our brief in *Sunray,* No. 335, pp. 39–42. Moreover, at the expiration of a certificate specifically limited in duration, the Commission has permitted cessation of service, without additional abandonment authorization under Section 7(b). *Phebus Pipe Line Co.,* 9 F.P.C. 384.[11] In these circumstances, it would be incredible to suppose that the Commission, without any explanation as to a change in policy and without any explicit statement, would have issued a limited-term certificate to Sun simply because its contract with Southern was for a term of years. Indeed, when the Commission, prior to issuance of Sun's certificate, had intended to limit the authorization to serve under a certificate to a fixed term, it had done so by an express condition as to time in granting the certificate. See, *e.g., Ray Phebus,* 2 F.P.C. 1044; *Louisi-*

[11] The Commission, thus, takes no issue with petitioner's conclusion (Br. 32–38) that authority to abandon service is not required under Section 7(b) if the certificate authority has expired by its own terms. No claim to the contrary has been made by the Commission.

ana-Nevada Transit Co., 2 F.P.C. 546; *Southern Natural Gas Co.*, 8 F.P.C. 688; *Texas Gas Transmission Corp.*, 9 F.P.C. 1062.

C. Petitioner's further claim (Br. 29) that the duration of the 1956 certificate must have been limited to the life of the 1947 contract because the Commission has authority only to issue the certificate upon the terms sought by petitioner (or to condition the grant on petitioner's accepting a certificate of unlimited duration) is also without merit for the reasons set forth in our brief in *Sunray*, No. 335, at pp. 21–24, 50 *ff*. See also Point I *supra*, pp. 15–43. In brief, Sun's contention fails to recognize that, by selling gas to Southern, it was necessarily rendering a service subject to the control of the Commission as to abandonment or termination.

Petitioner's certificate clearly did not require a perpetual service. Even if Sun had requested a limited-term certificate, the refusal so to limit the duration of the authorization would not have involved a Commission determination that the applicant would be required to continue its sales beyond the term of its contract. As we discuss in No. 335, pp. 50 *ff*, such a requirement could, in fact, occur only if (1) Sun's reserves underlying its sales are not depleted at the expiration of the contract term, (2) Sun seeks to abandon its service pursuant to Section 7(b) of the Act, and (3) the Commission refuses to authorize such abandonment. In the present case, such an issue is not present, since petitioner has made no effort to cease its service to Southern; on the contrary, it voluntarily

entered into a new twenty-year contract for a continuation of the service rendered since 1947.

These considerations also show the irrelevance of the contention (Br. 30–31) that the Commission lacked authority to require sales after termination of the 1947 sales contract and hence could not condition the certificate by requiring sales in excess of the "'quantity of gas called for in this agreement.'" It should be added that, in any event, the quantities which the contract contemplates might be sold would not necessarily be sold in the ten-year term of that contract. That would be true only if the contract had required a fixed quantity to be delivered during the contract term. But the annual minimum-take obligations of Southern depended on its own requirements; the percentage of those requirements which Southern could take, could, at its option, be increased from 20% to 30%, and the daily take could be increased to one and a half times the minimum (*supra*, p. 18). In such a situation it is impossible to guess at the precise quantity of gas covered by a contract at the time the Commission certificates a service. The various contentions that the Commission could not, by issuing the certificate, require petitioner to sell more gas than that covered by its contract are, thus, based on the erroneous premise that the certificate imposes such an affirmative requirement.[12]

In sum, the Commission in 1956 authorized the continuation of the service by Sun to Southern which had

[12] The Commission believes, however, that its authority with respect to abandonments is in no way limited by the "production or gathering" exception in Section 1(b) of the Act. See the discussion of this point in our brief in No. 335, at pp. 53–61.

commenced pursuant to the 1947 agreement, but the Commission did not limit this authorization to the duration of that agreement. The service rendered thereunder—sales and deliveries by Sun from its Gwinville Field reserves to Southern—was physically the same as that contemplated by the 1957 agreement, *supra*, pp. 21–23. It follows that no new certificate authority was necessary for Sun to continue its service to Southern under the latter agreement.

D. Finally, even if Sun, as it now claims, applied for a certificate of public convenience and necessity limited to the life of its contract, it actually accepted a certificate without express limitation and did not seek rehearing and review of the Commission's order granting that certificate. In these circumstances, petitioner cannot now complain that the Commission should have issued a limited certificate in the earlier proceeding, having waived any rights it might otherwise have had under Section 19(b) of the Natural Gas Act, *infra*, pp. 57–58, by not challenging the order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

1. The Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows:

Section 1. [15 U.S.C. 717] * * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4. [15 U.S.C. 171(c)] * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice,

to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission

shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

Sec. 7. [15 U.S.C. 717f] * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available

supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or

denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * * * *

Sec. 19. [15 U.S.C. 717r] * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be

taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs, 346 and 347).

* * * * *

2. The Federal Power Commission's Rules and Regulations, 18 C.F.R., provide in pertinent part as follows:

Sec. 2.4 [1949] Suspension of rate schedules

The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act:

* * * * *

(b) The Commission can suspend any new schedule making any change in an existing filed rate schedule, including any rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto contained in the filed schedule.

(c) Included in such changes which may be suspended are:

(1) Increases.
(2) Reductions.
(3) Discriminatory changes.
(4) Cancellation or notice of termination.

(5) Changes in classification, service, rule, regulation or contract.

(d) An initial rate schedule cannot be suspended.

(e) Immaterial, unimportant, or routine changes will not be suspended.

(f) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

(g) Changes under escalator clauses may be suspended as changes in existing filed schedules.

(h) Suspension of rate schedule, within the ambit of the Commission's statutory authority is a matter within the discretion of the Commission.

* * * * *

Sec. 2.52 [1949] Suspension of rate schedules

The Commission, in approving and adopting the interpretation stated in § 2.4, applied it also to the suspension of rate schedules under section 4 of the Natural Gas Act.

* * * * *

Sec. 1549.1 [1958 Supp.] Applicability

(a) *Definition.* An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

* * * * *

Sec. 154.92 [1958 Supp.] Filing of Rate Schedules by Independent Producer

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with

the Commission rate schedules, as defined in Section 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

* * * * *

Sec. 154.93 [1958 Supp.] Rate Schedule Defined

For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Sec. 154.94 [1958 Supp.] Changes in Rate Schedules

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate

schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in triplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

[Paragraph (b) as amended by Order 202, 23 F.R. 3715, May 29, 1958.]

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (1) the date on which such filing is proposed to be made effective; (2) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classifi-

cation or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the paragraphs (a) to (f) in this section, file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

Sec. 154.95 [1958 Supp., as amended by Order 202, 23 F.R. 3716, May 29, 1958] Oral agreements

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement.

Sec. 154.96 [1958 Supp.] Filing date

Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.92 through 154.99.

Sec. 154.97 [1958 Supp.] Cancellation or termination

When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, *Petitioner,*

vs.

FEDERAL POWER COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER, SUN OIL COMPANY

Petitioner, Sun Oil Company (Sun), submits the following Reply to the brief filed herein for the Federal Power Commission (Commission).

I.

UNDER THE NATURAL GAS ACT, AS INTERPRETED IN THE MOBILE DECISION, THE COMMISSION IMPROPERLY REJECTED SUN'S INITIAL RATE SCHEDULE AND CERTIFICATE FILINGS WITH RESPECT TO ITS 1957 SALES CONTRACT

The Commission's brief persistently uses such catch-phrases as "service" and "continuing service" which, by their constant repetition, tend to obscure the basic issue involved here, which is: Whether in the circumstances of this case the expiration of Sun's 1947 gas sales contract, by its own expressed terms, shall control the proper disposition of the rate

schedule and certificate applicable to that sale and, likewise, the initial rate schedule and certificate application filed with respect to Sun's 1957 gas sales contract. In this Reply Brief we shall seek to restore the basic issue to its proper perspective.

In *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, a case involving a strikingly parallel position taken by the Commission before this Court, the Commission in its brief,[1] using a similar technique, repeatedly employed the catch-phrase, "filed rate procedure," which there tended to obscure the fact that the procedure thus asserted involved in reality a complete departure from the price provisions of the gas sales contract in a way the Court determined was not intended by Congress. The Court in *Mobile* rejected the catch-phrase, and all that it stood for in the Commission's brief, and refused to allow such phrasing to obscure the Court's conclusion that the contract terms should control, in a proceeding initiated under Section 4(d) of the Natural Gas Act.[2]

We submit that, no matter how extensively the issue may be clouded by the semantics of the brief writer, the issue here is in substance no different from the issue decided by the Court in *Mobile*. Here, as in *Mobile*, the issue revolves around the degree of sanctity which is to be accorded the private sales contract in

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[1] Filed in No. 31, October term, 1955, styled *Federal Power Commission, Petitioner* v. *Mobile Gas Service Corporation*.

[2] In *Mobile*, the heart of the Court's decision is contained in the statement, 350 U.S. at 338: "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. • • •"

the regulatory structure created by Congress in the Natural Gas Act. And here, as in *Mobile*, the effect of the Act is such that the contract clearly should control. In *Mobile*, despite all of the Commission's protestations in favor of its authority to ignore the price provisions of a gas sales contract under Section 4 of the Act in the interest of a "filed rate" procedure," the Court's decision compelled the Commission to respect the terms of the contract. Likewise here, despite all of the Commission's protestations in favor of its authority to enforce a "continuing service," the Natural Gas Act can and should be interpreted as requiring that the terms of the contract be respected. In *Mobile* the contract terms involved were those relating to price, or rate. Here the contract terms involved are basically those of Sun's 1947 gas sales contract relating to the duration of the sale. In the posture of this case the contract terms relating to the duration of the sale are entitled to the same treatment and respect as those in *Mobile* relating to the price or rate at which the gas is sold. In substance, the issue is the same, and thus the conclusion should be the same.

In this section of our Reply Brief we shall speak generally of both the rate schedule provisions of Section 4 of the Act and the certificate provisions of Section 7 of the Act. It is apparent that the two sections have the same scope, so that any "transportation or sale" of gas requiring the filing of a rate schedule under Section 4(c) of the Act likewise requires the filing of a certificate application under Section 7(c) of the Act. By the same token, since essentially the same jurisdictional phrasing is used in both sections, any determination of the extent or duration of

the jurisdictional act which is the subject of Section 4(e) should likewise determine the extent or duration of the same act within the meaning of Sections 7(c) and (e). All such determinations are basically governed by the jurisdictional provision of Section 1(b) of the Act.[3]

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[3] Curiously, the Commission argues (FPC Br. 14) that the determination of whether Sun's 1957 sales contract constitutes a "change" in the rate schedule comprising the 1947 sales contract is not dependent on the duration of the certificate covering the earlier sale. It is obvious that if it is determined that the certificate covering the earlier sale expired with the expiration of the sales contract, because the certificate covering the sale coincided in duration with the duration of the sale, it naturally follows that the rate schedule applicable to the same sale must also expire with the expiration of the sale, thus leaving nothing which can be the subject of a "change." This is particularly true because the term "sale" can only have one meaning where used in Section 4(e) and in Sections 7(c) and (e) of the Act. And this is true whether Sun's 1947 sales contract represents a "sale," as we contend, or represents a "service," as the Commission contends throughout its brief by constant repetition of the term, because in either event Sun's jurisdictional act, whatever it may be styled, is limited in duration to the duration of its contract. However, it should also be noted that if there were any validity to the Commission's general contention that the determination of the status of the jurisdictional act under Section 4 is not dependent upon its status under Section 7, then it follows that the corollary of the Commission's assumption is even more clearly true—and that is that even if the certificate issued to Sun in 1956 were somehow construed as granting authorization in advance for all gas sales which might be made from the Gwinville Field during the life of the field, nevertheless each separate and distinct sale represented by a distinct sales contract (whether denominated as a "sale" or a "service") becomes the subject of an initial rate schedule within the meaning of Section 4(e) of the Natural Gas Act. Thus, the status of Sun's 1957 sales contract as an initial rate schedule under Section 4(e) of the Act is not necessarily dependent upon the duration of the certificate issued to Sun in 1956. We note further that the foregoing interpretation does not deprive the Commission of its overriding review authority under Section 5 of the Act, which authority was plainly not exercised in the circumstances of this case.

A. Sun's 1947 Gas Sales Contract Represented a Gas Sale Which Was Complete Within Itself

We emphasize the Commission's repeated use of the catch-word "service" throughout its brief because we believe that therein lies the basic error which permeates the entire brief. We shall note and discuss the basic error at some length. First, however, we should make clear that we most emphatically do not agree that under the terms of its 1947 gas sales contract Sun had covenanted to perform a "service," as distinguished from a "sale." The word "service" obviously has very little precise meaning within itself, contrary to the Commission's apparent view, and can only be properly viewed, for the purposes of this case, within the context of the Natural Gas Act. Viewed in that context, Sun's 1947 gas sales contract was not an agreement for the performance of a "service," but only an agreement by a gas producer to sell and deliver gas, a commodity, in certain determinable quantities and for a fixed term of years.

The basic jurisdictional provisions of Section 1(b) of the Act apply the entire body of the Act, in the circumstances specified therein, to either the "transportation" or the "sale" of gas. Nowhere does Section 1(b) or any other provision of the Act state, or even imply, that the word "service" shall be regarded as a generic term encompassing *all* of the acts of *all* natural-gas companies which are subject to the Commission's jurisdiction under Section 1(b) of the Act (FPC Br. 17). Certainly Section 4(e) does not lead logically to such a conclusion (FPC Br. 16), because the term "such * * * services," as used there, is most likely a reference to the antecedents "practices and regulations" in that section, and not to the expression

"any transportation or sale." In Section 7(b) of the Act the term "service" is used without any hint of a definition, except that the term as there used is obviously limited in scope to a jurisdictional act performed through jurisdictional "facilities." Similarly, the use of the term "service," in Sections 7(c) and (g) of the Act, proves nothing with respect to the all-inclusive generic nature of the term contended for by the Commission. On the other hand, it is clear from Section 7(c) that the term "service" does not generically include all gas sales—and, indeed, may not include *any* gas sale—since that section provides for the issuance of a certificate "* * * authorizing the whole or any part of the operation, *sale*, *service*, construction, extension, *or* acquisition covered by the application * * *."[4] To say the least, the disjunctive use of the terms "sale" and "service" is a positive showing that the term "service" does not include all sales, and it is a strong indication that the terms are mutually exclusive. The use of the term "service" in the succeeding clause of Section 7(c) is not revealing, because that clause simply means that the Commission must find that the applicant is able and willing to do *whatever* acts and perform *whatever* service may have been proposed.

The foregoing analysis is, of course, not completely satisfying as to the precise meaning of the term "service," as used in the Act. But there is no doubt that it does not have the generic connotation ascribed to it by the Commission (FPC Br. 17). And hence, in any event, the 1947 gas sales contract entered into by Sun was not an agreement to perform a "service,"

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[4] All emphasis is supplied in this Reply Brief, unless otherwise indicated.

within the meaning of the Act, but was rather an agreement to sell gas, a commodity.

After having first asserted the premise (FPC Br. 17) that *any* sale of gas constitutes a "service" within the meaning of the Act, the Commission then proceeds at great length (FPC Br. 18-25) to argue that Sun's 1947 gas sales contract was *in fact* a "service" agreement rather than a sales agreement. The latter argument would, of course, hardly be necessary if the Commission were convinced of the validity of its first premise. Moreover, the argument consists essentially of a bootstraps operation which, on close scrutiny, amounts to no more than an assertion by the Commission that Sun's 1947 contract was a service agreement because it was a service agreement.[5] Actually, Sun's 1947 gas sales contract (R. 32) was not essentially different in form or scope from hundreds of producers' gas sales contracts which have been filed with the Commission since it assumed jurisdiction over producers in 1954. The rather elaborate provisions for quantities of gas to be sold and delivered, as to which the Commission seeks to make so much (FPC Br. 18-19), were

[5] For example, the brief states with reference to Sun's 1947 contract (FPC Br. 18-19): that "* * * it goes to considerable pains to define the *service* to be rendered and to state the seller's obligations and buyer's rights in terms which show that readiness to serve is an important element. * * * Contract language could scarcely be plainer than the 'daily take' provision that a continuing *service* was to be provided * * *. That the 1947 contract was not solely a sale of gas, but was rather an agreement to enter upon a *service*, is also shown by the fact that the agreement did not transfer or purport to transfer title to any of Sun's gas to Southern. * * *" In truth, the contract thus described does not employ the terminology credited to it by the Commission. The net effect of this and like discussion in the Commission's brief is that the 1947 contract is a service agreement only because the Commission wishes it so treated.

not unusual, but rather were typical of other producers' sales of the same magnitude. In fact, rather than illustrating an open-end "service" agreement, as the Commission asserts, the quantity provisions of the 1947 contract clearly demonstrate that the quantities were ultimately to be fixed according to certain specified conditions existing during the term of the contract. These and the other provisions of the contract referred to by the Commission are no more than typical of the gas sales contracts which have been and are constantly being entered into by producers of gas. Sun's 1947 gas sales contract was typical of all those to which the Court of Appeals for the Fifth Circuit made reference, in *Gulf Oil Corporation* v. *F.P.C.*, 255 F. 2d 556, 557 (C.A. 5-1958), when it pointed out that independent producers of gas "* * * are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a *service* to the public." This is especially true of Sun's 1947 gas sales contract, which was entered into as a good faith sale of a commodity long before either Sun or its purchaser or the Commission itself seriously believed that the Commission had regulatory authority over the transaction, and which was thus deliberately entered into under the conditions of the market place and not under utility concepts of any kind.

In the light of the nature of the contract, as later affected by the Natural Gas Act, if Sun's 1947 gas sales contract did not represent a "sale" of gas within the meaning of the Act, but rather represented an agreement for a "service," as asserted by the Commission, then there can be no "sale" of gas within the meaning of the Act. We submit that there can be no transaction with respect to gas which can more

properly or fundamentally be designated as a "sale" of gas within the meaning of the Act than the transaction represented by Sun's 1947 gas sales contract. The entire contract is premised on the selling of gas by Sun and the purchasing of gas by Southern, and in 1947, when the contract was entered into, the parties could obviously not even have had in mind the vague service concepts suggested by the Commission's brief at this late date. We submit that if the Commission's present interpretation of the transaction were allowed to stand, much of the basic jurisdictional language of the Natural Gas Act will have been reduced to hollow, meaningless phrases. This is so because if Sun's 1947 contract does not represent a "sale" of gas, there is no way to accomplish a "sale" of gas, as distinguished from a "service" with respect to gas. Yet the entire jurisdictional predicate of the Act, as expressed in Sections 1(b), 4 and 7, is founded on either the "sale" or the "transportation" of gas. Surely Congress intended for those words to have meaning unto themselves; otherwise, Congress would have expressed the jurisdictional basis entirely in terms of the broad service concept which the Commission now seeks to have written into the Act.

The Court's decision in *Mobile* likewise makes clear the status of Sun's 1947 contract as representing a jurisdictional "sale" rather than a "service." In the light of *Mobile* (350 U.S. at 338) the Act evinces no purpose to abrogate private rate contracts as such. In *Mobile* the Commission sought to install a "filed rate procedure" concept which would have been superior to the terms of the private contract with respect to rates, but the Court rejected the suggested concept and held that the rates would be governed by

the private contract, subject to the Commission's review powers. Here, similarly, the Commission seeks to install a "service" concept which would be superior to the terms of the private contract with respect to the nature of the transaction contemplated by the contract—an agreement to sell and purchase gas. The philosophy of the Act, as expressed in the *Mobile* decision, compels the conclusion that the terms of the private contract govern the nature of the transaction within the meaning of the Act. In this light, the 1947 contract, clearly being an agreement by Sun only to sell gas, represented only a "sale" within the meaning of the Act, and not a "service."

Representing a *sale* of gas, Sun's 1947 contract, as we have pointed out at length in Sun's main Brief, governed the duration of the rate schedule applicable to the sale and likewise governed the duration of the certificate issued by the Commission in 1956 authorizing the sale. Since that rate schedule and that certificate expired upon the expiration of the sale under the terms of the 1947 contract, the 1957 gas sales contract, representing an entirely new, separate and distinct sale, could only be the basis for a new initial rate schedule and a new certificate.

B. Sun's 1957 Gas Sales Contract Represented a New, Separate and Distinct Gas Sale

There is a still more fundamental error in the Commission's brief. Throughout the brief, but somewhat clouded by the intricacies of the phrasing, there is constantly repeated the theme, which is in reality a bare assertion without support, that once having embarked upon the sale of gas represented by its 1947 gas sales contract, Sun could not withdraw from the further performance of such sale without Commis-

sion approval, even after the effective term of the sale had expired, and initiate a new, unrelated sale.

The theme is played in the Commission's brief, however, not by the use of the phrasing just stated above, but by first designating Sun's jurisdictional act performed under its 1947 contract as the performance of a "service" (rather than a sale), and then by gradually but repeatedly referring to the act as encompassing an obligation to perform a "*continuing* service," even after the expiration of the term of the contract, or, in the alternative, by referring to the act undertaken by Sun in its 1957 contract (R. 61) as constituting the "*same* service" as was covered by its 1947 contract.[6] The Commission's theme includes the proposition that after the expiration of the 1947 "service" contract, Sun was not empowered to initiate

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[6] Examples appear in the Commission's brief as follows:

"[Sun's contract is] • • • an agreement for the performance of a *supply service* which, once started, is the subject of continuing rate regulation and *may continue* independently of the parties' contract" (FPC Br. 15).

"• • • This makes doubly clear that, when Congress speaks of a sale or transportation, it is not referring to a single, isolated, individual, or unique event, nor simply to a legal relationship, but to a continuing process of selling or transporting—not to the sale or transportation of an identified 'batch of gas', but to a *continuing service*" (FPC Br. 16).

"• • • it makes no difference to the Commission's authority that the old contract • • • has expired and a new one • • • has been made—at least so long as the new contract envisages continuity of the *same service* performed in the past" (FPC Br. 20).

"• • • These factors demonstrate that the 1957 contract on its face called for a continuation of the *same jurisdictional service* as that rendered under the 1947 contract" (FPC Br. 23).

a new, unrelated "service" in the same field and with the same purchaser, but could only proceed to "change" the first "service" contract under Section 4(d) of the Act. There is in reality no support for such statements, either in the language of the Natural Gas Act or in the cases which have construed the Act. The statements rest on the mere assumption of the Commission, and no amount of repetition should be permitted to make them valid.

We are referring here to the gap which the Commission hurdles in moving from the premise of "service" to the conclusion of "continuing service" (with reference to Sun's obligation) or "same service" (with reference to Sun's 1957 contract). Even if we assume *arguendo* that the act performed by Sun under its 1947 contract somehow constituted a "service"—which we have shown is not correct—there is no authority, in the Natural Gas Act or elsewhere, for the proposition that the undertaking of such a service imposed an obligation to continue the service after the effective term of the contract which created it, or that Sun was not empowered to initiate a new, unrelated service upon the expiration of the first service contract. In other words, the Commission's assumption that the 1947 contract generated a "service" still leaves open the more fundamental question in this case—What was the term or duration of that "service"? Nor is there authority for the proposition that the act undertaken by Sun in its 1957 contract constituted the same service as was created by the 1947 contract. On the contrary, the impact of the *Mobile* decision, as we shall show, clearly invalidates the conclusions drawn by the Commission.

The conclusions drawn by the Commission are equally invalid whether the act undertaken by Sun in

its 1947 contract be called a "sale" or a "service." However, it is apparent that the Commission has recognized that if the act be called a "sale"—as it plainly was—then there is obviously no basis for an assertion that the later separate and distinct sale accomplished under the 1957 contract constituted a "change" in the rate schedule consisting of the 1947 contract within the meaning of Section 4(e) of the Act, since the first sale and rate schedule expired with the expiration of the contract and was not in existence to be changed. And similarly, the Commission seems to have recognized that if the 1947 contract be deemed to have effected a "sale"—as it plainly did—then the certificate which was issued in 1956 to cover such sale, under the authority of Section 7(e) of the Act, was only effective for the duration of the sale and automatically expired by its own terms upon the expiration of the sales contract. By asserting that the act undertaken by Sun in its 1947 contract must be designated as a "service," the Commission seeks to imply into the Natural Gas Act an obligation for a "continuing service" and seeks to imply into Sun's 1957 contract an identity with the first contract which will constitute the 1957 contract the "same service." However, in either event, whether "sale" or "service" be used, the basic issue in this case must ultimately be governed by the terms of the contracts, as was held in *Mobile*, and on such basis the Commission's orders involved here are invalid.

It should be made clear at this point that for purposes of this case we do not quarrel with the proposition that if Sun's act under its 1947 contract be deemed to constitute a service, there may have been an obligation looking to continuity of service during the effec-

tive term of the service so undertaken. In practical language, this would mean (FPC Br. 28-31) that during the term of Sun's 1947 contract any adjustment in rate provided in the contract or any agreed amendment of the contract would have constituted a "change" in rate schedule subject to the provisions of Sections 4(d) and (e) of the Act.[7] Our assumption for purposes of this case would also mean that during the term of Sun's 1947 contract any proposed discontinuance of "service" might have been subject to the provisions of Section 7(b) of the Act, since the "service" for the entire term of the 1947 contract had been certificated.

Our point is that, even if Sun's 1947 contract be deemed to have effected a "service," the "service" thus undertaken—as well as the "sale" thus undertaken, if the agreement be deemed an agreement to sell—came to a complete and final end upon the expiration of the contract which created it. The 1947 contract was the only conceivable thing which created or gave rise to the "service" of which the Commission seeks to make so much in its brief. In *Mobile* the Court has made clear that the contract, in circum-

[7] The Court below (R. 150), after citing two cases relating to the proposition set out in the text above, then stated that "it necessarily follows" that Sun's 1957 contract is a rate "change" under Section 4 of the Act. We have shown in Sun's main Brief (Sun Br. 43) that the Court's conclusion does not follow from the authorities cited, "necessarily" or otherwise. Judge Brown, in his dissenting opinion (R. 156), also emphasizes the same point. The Commission's entire brief is in reality a lengthy embellishment of the statement of the Court below that the conclusion "necessarily follows" from the premise. But in both the Commission's brief and the opinion of the Court below there is a marked absence of support for the conclusion. In truth, the conclusion is in conflict with the Natural Gas Act and this Court's *Mobile* decision, as we point out in the text.

stances like ours, is the basis for regulation. Hence, in the very nature of the Natural Gas Act, the "service" (or sale) entered upon under the 1947 contract could only endure during the life of that contract as expressly provided therein, and the "service" thus terminated, without more, upon the termination of the contract which created or gave rise to it.

Again in practical language, this means that the rate schedule comprising the 1947 contract and applicable to the "service" (or sale) undertaken by Sun under the contract, terminated and came to a complete end by its own terms upon the expiration of the 1947 contract, in accordance with Section 4(c) of the Act. The 1957 contract, submitted by Sun as a new initial rate schedule, could only be a separate initial rate schedule under Section 4(c). It could not be a "change" in the earlier rate schedule, under Section 4(d) of the Act, because the earlier rate schedule was no longer in existence to provide the subject of a "change." By the same token, the 1957 contract could not be for the "same service" (or sale) as the 1947 contract—and thus a mere "change" in the rate schedule consisting of the 1947 contract, as the Commission contends—because the earlier contract no longer existed, there was no reference or identity whatsoever between the two contracts, each was complete unto itself, the earlier contract did not even anticipate or contemplate a further contract, and there was a vast difference in the terms of the two contracts.[8] And

[8] The weakness of the Commission's argument that the 1957 contract was for the "same service" as the 1947 contract, and thus a mere "change," is plainly revealed by the Commission's statement (FPC Br. 25) that, "* * * Whether or not a contract has instituted a new service justifying an initial rate filing must depend on the facts of the particular case, and it would be difficult to

finally, our position means that the certificate issued by the Commission in 1956 authorizing the "service" (or sale) undertaken by Sun under the 1947 contract, terminated and came to a complete end by its own terms upon the expiration of the 1947 contract, in accordance with Sections 7(c) and (e) of the Act, because the only "service" (or sale) authorized by the certificate was that set forth in the contract which was incorporated in the application. The certificate could not have authorized more, since it was not then possible for Sun to show under Section 7(c) that it was "able and willing" to perform any more extensive a "service" (or sale), without a contract or a purchaser then available beyond the term of the 1947 contract.

The Commission's brief, in moving rapidly (and repeatedly) from the premise of "service" to the conclusion of "continuing service," clearly begs the principal issue in this case. The situation and the position taken by the Commission here are remarkably

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adopt a hard and fast rule. For this reason, we need contend no more than that on the facts of this case—where there has been no change in the physical facilities, source of the gas, or the buyer—the Commission and the Court below were entirely correct in concluding that the same service, in a jurisdictional sense, was continued by the second contract • • •." Assuming that this determination involves a question of fact, as the Commission states it is incredible that the mere fact that the second contract caused a sale of gas to the same buyer from the same field should constitute the second contract one for the "same service." This is not a determination of fact; it is rather the assumption of a preconceived result. Even more important, the Commission's statement wholly ignores the controlling impact of the Court's decision in *Mobile*, which requires such a determination to be made according to the nature of the *contracts* involved. Since the 1947 and 1957 contracts were entirely unrelated, and particularly because the 1947 contract contained a fixed term and did not anticipate the later contract, the two contracts could not have been for the "same service." In the light of *Mobile*, this is clear.

comparable to the situation and the position taken by the Commission in the *Mobile* case. In *Mobile* the Commission argued (350 U.S. at 340) that under the "filed rate procedure" of Section 4(d) of the Act natural-gas companies could initiate rate changes, and the Commission's only power is to set aside a new rate, under Section 4(e), if the new rate is found to be unlawful. The Court answered:

> "The major defect of this argument is that it assumes the answer to the very question in issue —whether natural gas companies are empowered to 'initiate' unilateral contract changes under § 4(d). That the so-called 'filed-rate' procedure is applicable to changes in contracts as well as other rates proves only that contracts may be changed, not that they may be changed unilaterally. * * *" (350 U.S. at 340).

In our case the Commission argues, in effect, that Sun's 1947 contract effected a "service" and that Sun's 1957 contract therefore effected no more than a "continuing service" which is a "change" within the meaning of Section 4(d) of the Act and a continuing part of the service authorized by the certificate issued in 1956. The Court's answer in *Mobile* can very aptly be paraphrased to fit the present Commission argument, as follows:

> The major defect of this argument is that it assumes the answer to the very question in issue —whether Sun is empowered, under Sections 4(e) and 7(e), to initiate a new, separate service (or sale) by contract upon the expiration under its own terms of an earlier service (or sale) contract which in no way anticipated or contemplated a further service (or sale). That the so-called "continuing service" procedure under Section 4(d) is applicable to changes in contracts which otherwise

continue in effect proves only that such continuing contracts may be changed, not that a "change" is accomplished under Section 4(d) when the first contract expires under its own terms and a new, separate and unrelated contract, not anticipated or contemplated in the first contract, is entered into.

In the light of the preceding statement of the issue, it is significant that the Court in *Mobile* first noted that:

> "* * * On its face, however, § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4(c) purports to define what constitutes a 'contract' that may be filed with the Commission. * * *" (350 U.S. at 339).

Then, in response to that problem, the Court held that:

> "* * * These sections are simply parts of a *single statutory scheme* under which all rates are *established initially* by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. * * *" (350 U.S. at 341).
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> * * * * *
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> "All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates *set initially* by natural gas companies, and there is nothing to indicate that they were intended to do more. * * * The obvious implication is that, except as specifically limited by the Act, the *rate-making powers* of natural gas companies were to be no different from those they would possess in the absence of the Act: * * *." (350 U.S. at 343).[9]

[9] We recognize also the Court's comment (350 U.S. at 341) to the effect that its holding that contracts, where *ex parte* rates are not involved, are the basis for the regulatory scheme of the

We submit that the scope of the Court's opinion and conclusion in *Mobile* obviously has as much application to Section 7 of the Act as it does to Sections 4 and 5 of the Act. With respect to all of those sections, it is apparent that the status of the contracts subject to Commission jurisdiction is to be determined, not according to whether they provide for or effect a formal classification of "sale" or "service," but rather according to the essential provisions of the contracts relating to the transactions reflected by the contracts and according to *basic contract principles*, however such transactions may be formally styled. Moreover, the status of a contract subject to Commission jurisdiction, whether it constitutes a rate schedule or the basis for a certificate application, may not be determined by the Commission in its uncontrolled discretion, as in truth the Commission seeks to do here after the event, but may only be determined in accordance with the terms of the contract itself, on the basis of fundamental contract principles.

Judging Sun's 1947 and 1957 contracts in accordance with the doctrine of *Mobile*, and thus as *contracts*, it is folly to contend that one was a mere "change" in or "continuation" of the other. Long before the advent of Commission regulation of gas producers, and in the utmost good faith, Sun and its purchaser entered into the 1947 contract for the sale and purchase of gas, the contract containing provisions for a fixed term and for specifically determinable quantities. Upon full and complete performance by Sun, the contract

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Act does not impair the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. However, the Commission did not seek to exercise any such paramount power in the circumstances of this case.

expired by its own terms in 1957. Viewed, not as a "single unique event" (FPC Br. 15), but *as a contract* for a term of years, as the *Mobile* doctrine would have us view it, the 1947 contract had terminated in 1957 and ceased to exist. The 1947 contract provisions did not anticipate or contemplate in any way any further or additional sale, service, or other transaction between the parties. When the 1957 contract was entered into, to take effect after the expiration of the earlier contract, no reference was made to the earlier contract. The 1957 contract was a completely new, independent, unrelated and self-sustaining sale and purchase agreement. In no way was it constituted as a "change" in or "continuation" of the earlier contract. Viewed *as a contract*, as the *Mobile* doctrine would have us view it, the 1957 contract could not conceivably be regarded as having any such relationship to the earlier contract. Nor could the fact that Sun chose to negotiate and deal with the same purchaser and to deliver gas under the new contract from the same field (FPC Br. 25) conceivably create any such relationship. On the face of the two contracts, they are entirely independent and unrelated and, in fact, were so conceived and treated.

Since the Natural Gas Act contains a "single statutory scheme" (350 U.S. at 341) under which rates are established initially by natural gas companies *by contract*, if they choose to do so, Sun's 1947 and 1957 contracts, with respect to all matters at issue here, had the same status under Sections 4 and 7 of the Act as they had *as contracts*.[10] Hence, the 1947 contract as a rate

[10] Again, we recognize that the Commission has certain overriding powers with respect to contracts, particularly under Section 5 of the Act, but no exercise of any such overriding power is involved in the circumstances of this case.

schedule, filed under Section 4(e) of the Act, expired and ceased to exist at the same time it expired *as a contract*. Similarly, since the 1957 contract was wholly unrelated to the 1947 contract, the later contract was properly submitted to the Commission for filing under Section 4(e) of the Act as an initial rate schedule. Viewed *as a contract*, it could not properly be treated as a mere "change" in the earlier contract, whether the earlier contract be regarded as a contract or as a rate schedule. And finally, the certificate issued by the Commission in 1956, authorizing the specific transaction or act represented by Sun's 1947 contract, whether it be regarded as providing for a sale or a service, had the same term as did the contract. Thus, the certificate expired and ceased to exist at the same time the act it authorized expired *as a contract*. The act represented by the 1957 contract was, then, properly the basis for a new and independent certificate application.

We submit that in the light of the Natural Gas Act, particularly as interpreted by the Court's *Mobile* decision, the Commission erred in rejecting Sun's initial rate schedule filing and its certificate application applicable to its 1957 contract.

II.

THE CERTIFICATE ISSUED WITH RESPECT TO THE 1947 SALES CONTRACT AUTHORIZED ONLY THAT SALE

What has been said in Sun's main Brief, together with the discussion contained in the preceding section of this Reply Brief, dispose of the principal arguments advanced by the Commission. However, there are some subsidiary points which we desire to comment upon, and these will be considered as they

concern certain parts of the Natural Gas Act. This section of our Reply Brief relates to matters involving Section 7 of the Act.

In Sun's main Brief (Sun Br. 16-38) we have established that Sun, upon the advent of Commission regulation of gas producers, sought only a certificate authorizing the sale of gas covered by its 1947 gas sales contract for the remaining term of that contract, and that Sun in 1956 was issued a certificate which authorized only that sale as described in Sun's application. We have also established that such a certificate constituted the limit of the Commission's authority under the circumstances. Hence, the certificate issued in 1956 expired with the expiration of Sun's 1947 contract, and Sun's application for a certificate applicable to its 1957 gas sales contract could not lawfully be rejected by the Commission.

The main thrust of the Commission's response (FPC Br. 40-44) is directed at an attempt to rationalize the Commission's 1956 certificate, long after the event, as having variously authorized a "service" (FPC Br. 41) or "separate acts of selling gas" (FPC Br. 43). The Commission (FPC Br. 42) arbitrarily concludes from that rationalization that "* * * the Commission did not authorize sales or service by Sun only for the remainder of the contract term. * * *" As we show in the preceding section of this Reply Brief, the conclusion begs the question. Whether the act undertaken by Sun in its 1947 contract be characterized as a "sale" or a "service" or a "series of sales," the fact still remains that the *contract* determines the duration of the act undertaken by Sun. The act undertaken by Sun in its 1947 contract was the basis, and the only basis, for its application for a certificate (Sun Br. 18

23). Moreover, the application was granted, without qualification or condition, and the act undertaken by Sun in its 1947 contract thus became the act authorized by the certificate issued by the Commission, including the duration of the act (Sun Br. 23-38). This result is in keeping with the "single statutory scheme" of the Natural Gas Act, especially as explained in the *Mobile* decision (350 U.S. at 341).[11] More particularly, this result is in keeping with Sections 7(c) and (e) of the Act, as we show in the preceding section of this Reply Brief and in Sun's main Brief.

It contributes nothing to the issue to point out (FPC Br. 41-42) that in two places the Commission's 1956 order issuing the certificate used the term "service." For the certificate was completely clear in authorizing the act for which authority was requested in Sun's application (Sun Br. 23-31), and the application was likewise completely clear in requesting only authority to complete the act undertaken in Sun's 1947 contract (Sun Br. 18-23). Although the contract represented a sale within the meaning of the Natural Gas Act, as we have shown, the result is the same even if the contract be regarded as representing a "service" or a "series of sales." In any event, the scope of Sun's application, and hence the scope of the Commission's certificate, were, by their very nature, limited in duration to the duration of the 1947 contract which represented the sole basis for both the application and the certificate.[12]

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[11] See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

[12] One point may be set at rest here. The Commission (FPC Br. 22) has quoted what it calls a "concession" from Sun's Brief in the Court below. The quotation is not in context. In the

Similarly, it contributes nothing to the issue here to point out (FPC Br. 43) that, "* * * If Sun had in fact desired a certificate limited in duration to the period of the 1947 contract of sale it would have been simple to say so explicitly; but it did not. * * *" The fallacy in this statement is that Sun sought precisely what Section 7(c) of the Act requires—a certificate authorizing the very sale it had undertaken by its 1947 contract—no more and no less. Sun's application was, of necessity, limited to the contract, and the certificate thereafter issued by the Commission was, of necessity, limited to the "* * * sale by Applicant of natural gas * * * as more fully described in the application and exhibits * * *" (R. 110). Nothing more was either required or permitted by law, since Section 7(e) of the Act requires that the certificate "* * * shall be issued * * * authorizing the whole or any part of the * * * sale * * *." A certificate purporting to authorize a perpetual sale or service would have been, in the circumstances of this case, the "conditional" certificate; yet the Commission neither specified nor even implied such a condition in the certificate actually issued, assuming *arguendo* that it had the power to do so.

By the same token, Sun's statement in its application (R. 26) that it sought a certificate "* * * to authorize the continued sales by Sun of its gas" had direct

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earlier stages of this controversy the Commission had variously argued, among other things, both the "continuing service" doctrine and the applicability of Section 7(b) of the Act. The language now quoted, along with other language not quoted, was designed to show that there could be no abandonment, as argued by the Commission in one phase, if the 1957 contract represents a continuing service, as argued by the Commission in another phase. If there is truly any doubt on the Commission's part, we do not concede that the 1957 contract represents a *continuation* of either service or sale.

reference to its contract with Southern Natural Gas Company (R. 28), and was entirely consistent with this concluding statement in the application (R. 29): "* * * This application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described. * * *" The inference which the Commission seeks to draw (FPC Br. 44) from the statement first quoted is simply untenable.

The statements made and cases cited by the Commission (FPC Br. 44-47) with respect to its "prior interpretations and practices" are not relevant in the circumstances of this case. In the first place, we assert (Sun Br. 23) that by the very language of the order issued in 1956 Sun was granted a certificate limited to the duration of its 1947 sales contract. The term of such a certificate must be determined from the language of the certificate itself, not from any consideration of the subjective intent of the Commission or its disposition of other cases not involving Sun. *Cf. United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 426-9; *Bingler Vacation Tours* v. *United States*, 132 F. Supp. 793, 796. Moreover, the matters at issue in this case were not developed in the decisions of the Commission which it now cites in its brief. In addition, those decisions antedated the decision of this Court in *Mobile*, while the order granting a certificate to Sun was issued by the Commission after the *Mobile* decision. In the *Panhandle Eastern* case cited by the Commission (11 F.P.C. 167, 172; FPC Br. 45) it is apparent that the Commission had earlier issued a pipeline certificate which specifically contemplated a continuing pipeline service and was accepted by the pipeline on that basis. In the *United Gas* case (3 F.P.C.

3, 5; FPC Br. 46), the contract involved was not for a fixed term, and thus the case is not at all in point here. Likewise, the *Sunray Oil Corporation* case (14 F.P.C. 877; FPC Br. 45) is irrelevant because the Commission's decision there was based entirely on a matter of statutory interpretation, not Commission intent or discretion, and the interpretation was rejected on appeal. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (CA-10), reversed and remanded, 353 U.S. 944. It is also significant that all of the instances cited by the Commission (FPC Br. 46-47) of its having fixed expressly the terms of limited certificates, involved pipeline proposals to construct facilities and operate them for fixed periods. The usual pipeline certificate applications to construct and operate facilities and make sales by means of such facilities contemplate operations of unlimited duration, the true "continuing service" of which the Commission speaks so much. Hence, the instances cited by the Commission are exceptions to the general rule and involve special pipeline situations. The Commission's practice in such instances has no application or relevance to sales of gas by independent producers and no significance with respect to this case. In any event, the fact that the Commission has had occasion to express time limits in some certificates would not be controlling since, as we have pointed out above, the duration of Sun's certificate must be determined from the language of the certificate itself.

III.

SUN'S 1947 SALES CONTRACT EXPIRED BY ITS OWN TERMS, BOTH AS A CONTRACT AND AS A RATE SCHEDULE, AND ITS 1957 SALES CONTRACT DID NOT CONSTITUTE A CHANGE IN RATE SCHEDULE

There are additional subsidiary points in the Commission's brief which we desire to comment upon, and this section of our Reply Brief relates to those involving Section 4 of the Act.

The Commission (FPC Br. 33-40) has completely misconceived our point with respect to the effect on this case of the Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and the Court's further decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. The Commission's misconception is typified by the Commission's statement that, "* * * *Mobile* recognized the Commission's authority to review any *contracted* change in a contracted rate or service, and to suspend the change pending hearing, as provided for in Section 4(e) * * *" (FPC Br. 34—emphasis by the Commission); and its further statement that, "* * * in *Memphis*, the entire Court accepted the principle that agreed-upon changes in rates could be filed pursuant to Section 4(d) * * *. That, of course, is precisely the situation in this case" (FPC Br. 36).

The Commission's misconception of the effect of *Mobile* and *Memphis* is this: We do not question that the Court held that agreed-upon *changes* in rates must be filed under Section 4(d). Nor do we question that Sun's rate in its 1947 contract and its rate in its 1957 contract were *agreed-upon* rates. Our point, which is not recognized at all by the Commission's brief, is and has been that whether an agreed-upon rate is a

change within the meaning of Section 4(d) or an *initial rate* within the meaning of Section 4(e) must itself be determined by reference to the contract which creates the rate. That is as much a part of the meaning of *Mobile* and *Memphis* as is the principle the Commission attributes to those decisions. In our case it is not enough to say that agreed-upon changes must be filed under Section 4(d). We do not quarrel with that point. But stopping there evades the issue. For that statement leaves entirely open the question—What is a *change* under Section 4(d) and what is an *initial rate* under Section 4(e)? *Mobile* and *Memphis* require not only that the determination of whether a rate is *agreed-upon* be reached in accordance with the terms of the contract, but also that the determination of whether an agreed-upon rate is an *initial rate* or a *change* in rate be reached in accordance with the terms of the contract. That is part of the "single statutory scheme" of the Natural Gas Act (350 U.S. at 341).

As we have shown, there is no doubt, in the light of *Mobile* and *Memphis*, that the rate provided in Sun's 1957 contract is an initial rate and that the 1957 contract constitutes an initial rate schedule within the meaning of Section 4(e) of the Act. Conversely, the 1957 contract is not a change within the meaning of Section 4(d). The 1947 contract had come to a complete end by performance and had ceased to exist when the 1957 contract became effective. There was then no contract or rate schedule in existence to change. The 1957 contract was complete, independent and unrelated. It could only be an initial rate schedule under Section 4(e) of the Act.

In this connection the Court's decision in *Atlantic Refining Co.* v. *Public Service Commission of New*

York, 360 U.S. 378, is not at all in point, despite the Commission's assertion (FPC Br. 38) that it "tends" against Sun's position here. The *Atlantic* case involved the Commission's power to attach a rate condition to a certificate under Section 7(e) of the Act, and the Court commented that the imposition of a proper rate condition in a certificate proceeding is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, as construed in *Mobile* (360 U.S. at 391). We do not, of course, question in this case the Commission's power to attach appropriate rate conditions to certificates, but such a rate-conditioning power is simply not an issue here. Most assuredly, on the other hand, the Commission's rejection of Sun's 1957 contract submitted as an initial rate schedule does constitute an encroachment upon Sun's initial rate-making privileges. In that respect the *Atlantic* decision supports Sun's position here. And in Sun's main Brief, we have pointed out other ways in which the *Atlantic* decision supports Sun's position here (*e.g.*, Sun Br. 16, 26, 34-35).

Sun does not argue that the 1957 contract must represent an initial rate schedule because suspension would "interfere" with or "modify" the terms agreed upon by the parties (FPC Br. 33, 37). That is one among many of the *effects* of the Commission's position here, but it is not in itself the *cause* of Sun's position. Sun's position is that its 1957 contract should properly be treated as an initial rate schedule because it is such under Section 4(c) of the Act, as construed in *Mobile*. Nor does Sun argue that private contracts "* * * are not subject to regulation at all * * *" (FPC

Br. 35). By the same token, Sun recognizes the "* * * 'overriding authority of the Commission,' * * * *" (FPC Br. 35).[13] Such statements as those just quoted from the Commission's brief simply do not approach the issue here. Similarly, the Commission's statement (FPC Br. 37) that, "* * * If Sun were correct, no mutually agreed-upon rate * * * would constitute a changed rate within Section 4(d) * * *" is completely in error. We have already pointed out that we do not here question that price adjustments under contracts (and rate schedules) which otherwise continue in effect may be "changes" within the meaning of Section 4(d). We shall make this point again in connection with certain cases which are mentioned below.

The Commission (FPC Br. 29-31) cites certain decisions of courts of appeals for the proposition (FPC Br. 29) that "* * * rate changes contemplated by contracts filed as rate schedules are not self-executing and can become effective only after compliance with the notice provisions of Section 4(d) * * *." The statement of the proposition alone readily shows that neither the statement nor the cases are in point here. For the proposition includes changes "* * * *contemplated* by contracts filed as rate schedules * * *." In our case Sun's 1947 gas sales contract which was filed as a rate schedule did not *contemplate* any change at all within the scope of this case. It simply provided for a fixed duration, and at the end of that period of time it came to a complete end and, therefore, ceased to exist. It did not *contemplate* any further transaction with either the same purchaser or any other purchaser, nor did it *contemplate* any further or continuing sale (or serv-

[13] See, for example, Footnotes 9 and 10, *supra*.

ice) of any kind after its own term. Viewing the facts in that light, it is somewhat amazing that the Commission appears to argue that Sun's 1957 gas sales contract, a wholly unrelated and separate transaction, amounted to a change which was *contemplated* by the 1947 contract previously filed as a rate schedule. We have already pointed out that the later contract was not a "change" in the earlier contract at all. Certainly, if the standard for determining when a "change" in a contract or rate schedule occurs within the meaning of Section 4(d) is to be based on whether the first rate schedule itself "contemplated" the change, then there can be no doubt that Sun's 1957 contract was not a change in the earlier contract, judged either as a contract or as a rate schedule. For in this case the later contract was not contemplated by the earlier contract in any conceivable manner.

The cases cited by the Commission (FPC Br. 30-31) do bear out the standard that a "change" occurs within the meaning of Section 4(d) of the Act when the rate schedule which is the subject of the change either specifically provides for or specifically contemplates the change and otherwise continues in effect. All of the cases so cited involved adjustments in price occurring under the express provisions of existing rate schedules which continued to exist after the price adjustments. In other words, the changes which occurred in those cases were clearly contemplated by the very contracts which were on file as rate schedules and which were otherwise to continue in effect. Such is plainly not the case here, since in the circumstances of this case the 1947 contract which was on file as a rate schedule contemplated only its own demise, not a

change of any kind. Thus, the 1957 contract could not constitute a change.[14]

The Commission's reliance on *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, is likewise without merit (FPC Br. 31-33). The quotation from the Court's opinion which appears in the Commission's brief is misleading unless considered in context with the entire opinion. The Commission's order involved in *Penn Water* was issued after extensive hearings on the basis of which the Commission found that indefinite continuance of the service was in the public interest. The Court affirmed the Commission's order, primarily on the basis of the authority granted the Commission in Section 206 of the Federal

[14] The decision in *Michigan Wisconsin Pipe Line Company* v. *Panhandle Eastern Pipe Line Company*, 226 F. 2d 60 (CA-6), *certiorari* denied, 350 U.S. 987, is more in point than the cases cited by the Commission. That decision shows conclusively that the filing of a contract as a rate schedule does not abrogate its terms. The Court held that the provisions of a contract as to "terms and conditions" of service were not modified in a situation where the Commission had made a specific finding, after hearing, that the rates of the company to which the terms and conditions applied were unjust and unreasonable and had later accepted a new rate schedule with a new applicability provision which, if valid, would have affected the "terms and conditions" of service. The Court specifically held that the new applicability provision was without "legal effect," because the Commission had not taken the requisite statutory steps to put it into effect to supersede the corresponding provisions of the contract. The Court recognized that the Commission had the authority to modify contractual arrangements, but only by following the procedure of Section 5(a) of the Act. Relating that case to the case here, it is apparent that Sun's mere filing of its 1947 contract as a rate schedule, with no authorized action being taken by the Commission thereafter with respect to the rate schedule, would not extend the duration of the contract or rate schedule beyond its stipulated expiration date. See also *Central Kansas Power Co.* v. *Kansas State Corporation Commission*, 316 P. 2d 277 (Kan. Sup. Ct.).

Power Act, which is substantially identical with Section 5(a) of the Natural Gas Act. The Court pointed out that under that section the Commission had the power to order the companies involved to continue indefinitely their long-existing operational "practice" of integrating their power output. The Court also relied on Section 202 of the Power Act, authorizing the Commission to compel interconnection and coordination in the public interest, for which section there is no counterpart in the Natural Gas Act. In sum, the action taken by the Commission in the *Penn Water* case compared to action which might be taken by the Commission to alter a rate schedule, after full hearing and appropriate findings, under Section 5(a) of the Natural Gas Act. After the taking of such action, the regulated company could itself seek a further change in the newly imposed rate schedule only by proceeding under the rate change provisions of the appropriate statute. That explanation accounts for the language of the Court's opinion quoted in the Commission's brief. No such proceeding as in *Penn Water* occurred in this case, even assuming the propriety of a proceeding to extend the duration of a rate schedule, and, consequently, the *Penn Water* decision is not relevant here.

Finally, the insistent demand which the Commission makes in favor of a maximum of regulatory authority (*e.g.*, FPC Br. 37) finds a ready answer in the Court's statement in the *Memphis* decision, 358 U.S. at 113:

> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose

financial stability the gas-consuming public has a vital stake. * * *"

One of the legitimate interests concerned is surely the reasonable preservation of the integrity of the private contracts involved in the regulatory scheme. Such a preservation is at stake here.

CONCLUSION

For the additional reasons urged herein, it is respectfully submitted that the judgment of the Court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 321.—October Term, 1959.

Sun Oil Company, Petitioner, v. Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 27, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents many of the same issues as *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, p. —, *ante*. Petitioner, Sun Oil Company, is an independent producer making sales of natural gas to transmission companies in interstate commerce for ultimate resale to the public. In 1947 it entered into a contract with the Southern Natural Gas Company, a transmission company, for the sale of natural gas which petitioner controlled in the Gwinville Gas Field in Jefferson Davis and Simpson Counties, Mississippi. The term of the contract was 10 years and the sales price was roughly eight cents per Mcf.

After this Court's decisions in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, on June 7, 1954, the Commission, in a series of orders, required independent producers engaging in jurisdictional sales on or after the date of the decision to apply for certificates of public convenience and necessity pursuant to § 7 (c) of the Natural Gas Act.[1] Under protest, petitioner applied for a certificate "authorizing the sale of natural gas in the circumstances . . . described" in its application. The described circumstances consisted simply of a reference to its contract with Southern Natural, which was at the same time submitted

[1] The pertinent provisions of § 7 (c) are set forth in our opinion in the *Sunray* case, p. —, n. 15, *ante*.

by petitioner as its rate schedule. In an abbreviated and consolidated proceeding disposing of over 100 separate docket certificate applications from 40-odd independent producers, scattered from Colorado and New Mexico to West Virginia, the Commission on May 28, 1956, ordered issued to petitioner and each of the other applicants a certificate of public convenience and necessity, in the terms set out in the margin.[2] Petitioner's contract-rate-schedule was accepted as its FPC Gas Rate Schedule No. 55.

The 1947 contract between petitioner and Southern Natural expired on August 26, 1957. The parties however entered into a new 20-year contract for continued

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[2] "The Commission ORDERS:

"(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

"(B) The certificate issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicant within 30 days from issuance of this order.

"(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

"(D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the service herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Applicant. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved."

sale of gas from the same field, commencing on September 3, 1957. The contract called for an initial price increase of roughly 150 per cent, to 20 cents per Mcf.[3] Petitioner took the view that the certificate it had received in 1956 was limited in term to the duration of the old contract. It accordingly filed an application for a new certificate covering the new contract, and filed the new contract as an initial rate schedule under the new certificate, pursuant to § 5 of the Act.[4] The Commission, in a letter order of September 12, 1957, rejected the certificate application as duplicative of petitioner's existing certificate to make sales from the field in question, and rejected the rate-schedule filing on the ground that the purported initial rate schedule was actually a change in its existing Schedule No. 55. A motion for reconsideration was later denied; and at the same time the Commission ordered suspended, under § 4 (e) of the Act,[5] the effectiveness of the rates in the new contract, which petitioner had, after their rejection as an initial rate schedule, filed under protest, as rate changes pursuant to § 4 (d). 18 F. P. C. 609, 611. After an application for rehearing of the suspension order was rejected, petitioner petitioned for review of all these orders of the Commission in the Court of Appeals for the Fifth Circuit.[6] That court affirmed, by a divided vote. 266 F. 2d 222. We granted certiorari. 361 U. S. 880.

[3] There are slight discrepancies in comparison between the old and new rates, due to the fact that they are computed on somewhat different pressure bases. The Commission states that giving effect to the difference would somewhat increase the spread between the old and the new rates.

[4] For the pertinent provisions, see the *Sunray* opinion, p. —, n. 11, *ante*.

[5] For the provisions, see the *Sunray* opinion, p. —, n. 13, *ante*.

[6] The Commission takes the position that an order suspending a rate change under § 4 (e) is not directly reviewable in the Court of Appeals. But since the very same issues are presented in this case by the Commission's rejection of the application for a new certificate,

Petitioner's contention here, as it was below, is that the initial certificate it obtained in 1956 was to remain in effect only during the life of the 1947 contract. This in its view would leave it free to discontinue interstate sales after the 1957 expiration of the contract, or to apply for a new certificate for new sales, and, not unimportantly, file the new sales contract as an initial rate schedule thereunder rather than as a rate change. We reject this contention and affirm the judgment of the Court of Appeals.

First. The major part of petitioner's argument is based on a want of authority in the Commission, over objection, to grant an independent producer a certificate for a longer duration than the term of a sales contract which its application seeks permission to fulfill. To be sure, if the Commission had no such authority, we might take pains to read the petitioner's application as seeking a certificate so limited in time, though, as compared with Sunray's in the companion case, it is highly inexplicit as to its desire that only a term certificate be issued. But we have held today in the *Sunray* case, p. —, *ante*, that in these circumstances the Commission has authority to tender a permanent certificate under an application for a term certificate; and accordingly this keystone of petitioner's argument falls.

Second. Of course, if, despite its authority to grant a permanent certificate, the Commission had in 1956 actually granted a term certificate to petitioner, petitioner

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and its rejection of the filing of the 1957 contract rate as an initial rate under § 4 (e), which orders are concededly reviewable in the Court of Appeals, all the contested issues raised before the Commission were properly subject to review in the proceedings below and here, as the Commission concedes. If the Commission was in error in rejecting the application for a new certificate and the purported initial rate filing, the § 4 (e) rate change filing, which the petitioner made under protest, doubtless would be withdrawn.

would after the term have been free to apply for a new certificate to authorize the sale under the new contract. But we agree with the Commission that the 1956 certificate was a permanent one. The application itself, under the construction we have given the statute in *Sunray*, did not with any explicitness ask for a limited certificate. It asked for one "authorizing the sale of natural gas" under the 1947 contract; but as we said in *Sunray*, a permanent certificate would do that. See p. —, *ante*. And the certificate issued makes no reference to any limitation of time. This is in contrast with explicit references to the limitation in those instances where the Commission had previously issued term certificates.[7] The Commission's order, which blanketed the many applications before it in the mass proceeding, is no more explicit about limitation than the application, and refers, in fact, to the certificate as both "authorizing the sale" of natural gas, and authorizing a "service," which accords with our construction of § 7 (e) in *Sunray*. Under these circumstances we would hardly see any basis for overturning the Commission's view that no limitation as to time was implied. Cf. *Andrew G. Nelson, Inc.*, v. *United States*, 355 U. S. 554, 560.

Moreover, if there were any doubt as to the matter, it would be removed by the fact that the batch of certificates containing petitioner's was issued at a time when the Commission was asserting that it lacked even the power to issue a term certificate. The certificate in question was issued May 28, 1956. The Commission had taken the position that it lacked such authority on July 25, 1955, in *Sunray Oil Corp.*, 14 F. P. C. 877. It was not until October 29, 1956, that judicial rejection of

[7] See, e. g., *Louisiana-Nevada Transit Co.*, 2 F. P. C. 546, 549 (10 years); *Ray Phebus*, 2 F. P. C. 1044, 1045 (8 years); *Southern Natural Gas Co.*, 8 F. P. C. 688, 689 (1 year).

the Commission's position occurred.[5] *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, reversed on other grounds, 353 U. S. 944. Nothing in petitioner's application shows an attempt to take issue with that conception of the Commission, which of course would mean that every certificate granted under its influence would be intended to be permanent. It would surpass belief to say that under these circumstances the Commission tendered and the applicants received these certificates under the assumption that they were limited in time to the terms of the contracts on which the applications were based.

Affirmed.

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[5] While the Court of Appeals there affirmed the Commission's order on other grounds from those on which it had proceeded—for which action the Court of Appeals' judgment was reversed here—the Commission had, before the Court of Appeals, maintained its position that it was without authority to grant a limited term certificate. 239 F. 2d, at 100, n. 7. It abandoned that position when application for certiorari was made here. 353 U. S. 944.

SUPREME COURT OF THE UNITED STATES

Nos. 321 AND 335.—OCTOBER TERM, 1959.

Sun Oil Company, Petitioner, 321 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Sunray Mid-Continent Oil Co., Petitioner, 335 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER, and MR. JUSTICE STEWART join, dissenting.

The basic issue presented by these two cases is essentially this: When an independent producer of natural gas enters into a contract for the sale of his gas in interstate commerce for resale, and seeks a certificate from the Federal Power Commission to carry out that contract, may the Commission issue a certificate of unlimited duration not limited to the term of the contract, in the absence of a special showing that the public convenience and necessity require the certificate to be perpetual? In holding that it may, I believe the Court has strained the provisions of the Natural Gas Act beyond permissible limits in order to reach a result which it deems more appropriate to effective regulation. In my opinion, neither will the Act bear the meaning the Court attributes to it, nor will a contrary interpretation bring about the practical evils which the Court imagines.

I.

In my view the Court's conclusions are attributable at bottom to its failure to take into account the basic distinction between an interstate pipeline and an inde-

pendent producer of natural gas. A pipeline performs a service akin to those traditionally performed by public utilities. The independent producer, on the other hand, is unique among the objects of public-utility regulation because it is not engaged in rendering a service to the public in the conventional sense of that concept, but rather simply in selling a commodity which it owns. The Court's basic error, it seems to me, is its notion that the petitioners are rendering a continuing service to the public in the same sense as a pipeline or other conventional utility, to which the usual modes of utility regulation are equally applicable.

I think that the Natural Gas Act, particularly as construed by the Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, recognizes this important distinction. The basic jurisdictional framework of the Natural Gas Act is found in § 1 (b) which provides:

> "The provisions of this chapter shall apply to the *transportation* of natural gas in interstate commerce, to the *sale* in interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such transportation *or* sale, but shall not apply to . . . the production or gathering of natural gas." (Emphasis added.)

In *Phillips* the application of this provision to independent producers, such as the petitioners in these cases, was considered. Phillips there contended that it was not subject to the Act because it did not engage in the interstate transmission of gas and was not affiliated with any interstate pipeline company, and that to regulate its prices would be to control the "production or gathering" of natural gas, which is specifically exempted by § 1 (b). The Court rejected that argument, holding that Phillips' *sales*, which were unquestionably made "in interstate commerce . . . for resale," were subject to the Commission's jurisdiction.

It recognized that the Act creates two separate and distinct bases of jurisdiction—transportation, and sale; that an independent producer engages solely in the latter; and that because of the production and gathering exemption, it is *only* the act of sale itself, which occurs at the very end of the production and gathering process, to which the Commission's jurisdiction attaches. It is thus evident that the Court recognized that, as to independent producers, the Act envisaged only a limited scheme of regulation, namely control over the prices and the other terms of sale of their natural gas. The blurring of this distinction respecting the scope of the regulatory scheme of the Act as between independent producers and others can only lead to confusion when, as here, the Court is faced with deciding the proper scope of the operative provisions of the statute.

The operative provisions of the Act consistently reflect their more limited reach as regards independent producers than with respect to others. Section 7 (c) requires certification in order to

> "engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof . . . ."

Thus three distinct categories of jurisdictional acts are subject to certification: (1) transportation, (2) sale, and (3) maintenance of jurisdictional facilities. A pipeline must necessarily secure authorization for both transportation and maintenance of jurisdictional facilities, acts which by their nature are continuing services. But I do not understand the Court to contend that petitioners, as independent producers, have engaged in any jurisdictional act other than a sale.

The word "sale," in its ordinary sense, signifies a transaction limited in duration and amount. Section 7 (c) requires certification of a sale, and there is nothing in the Act which suggests that the certification is to be broader than the jurisdictional act which it authorizes. On the contrary, § 7 (e), *ante*, p. —, directs the Commission to issue a certificate authorizing "the . . . sale . . . covered by the application." The Court suggests that a perpetual certificate does in fact authorize the specific sale proposed, and that to say that the Commission can authorize *no more* than that is to "load" the statutory language with a negative implication which was never intended. However, authorizing a producer to sell in perpetuity is certainly something different from authorizing him to make a specific sale. It could hardly be contended that a statutory direction to the Commission to authorize "the . . . sale . . . covered by the application" permits it to authorize some *different* sale.

The Court's assumption that a perpetual certificate authorizes nothing different than what the producer has in effect applied for can in the end be justified only by its view, alluded to before, that what is involved is not a "sale" at all, but a "service" consisting of the perpetual movement of gas in interstate commerce. However, as already mentioned, this flouts the industrial realities. The independent producer does not perform a service; he owns and sells a commodity. Since he need not dedicate his gas supply to the interstate market at all, surely he may propose the amount he will dedicate. The Commission of course need not accept the proposal. But neither can it in effect require acceptance of a certificate authorizing something more, on pain of denying the applicant any certificate, without satisfying the requirements of § 7 (e), *infra*, for the imposition of conditions on certificates.

The Court, however, purports to find support in the statute for its notion that a sale is really a perpetual

service. It relies primarily on § 7 (e), which provides in relevant part that

> "a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the *operation, sale, service, construction, extension, or acquisition* covered by the application, if it is found that the applicant is able and willing properly to *do the acts and to perform the service* proposed, . . . and that the proposed *service, sale, operation, construction, extension, or acquisition* . . . will be required by the . . . public convenience and necessity . . . ." (Emphasis added.)

It would appear plain from the face of the very language quoted that, while the word "service" is used, it is used disjunctively with "sale" and several other words, so that a sale and a service are simply two different, and not synonymous, things the Commission is authorized to certificate. However, the Court reasons that "service" must refer back to "transportation or sale," for which § 7 (c) requires a certificate. But § 7 (c) requires a certificate for three separate categories of jurisdictional acts—transportation, sale, and maintenance of facilities. And § 7 (e), concededly referring back to those categories, lists six items—operation, *sale*, service, construction, extension, and acquisition. Why the term "service" in § 7 (e) should be thought to refer to "sale," the least apt of the three categories in § 7 (c) which it could describe, when it is immediately preceded in § 7 (e) by the word "sale" itself, is difficult to understand.

The Court further says that the provisions of §§ 4 (c)[1] and 7 (b)[2] present the same feature. In § 4 (c), the word

[1] "(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and

[*Footnote 2 is on p. 6.*]

"service" again appears as part of an omnibus definition which refers to a number of antecedents. Even assuming, as the Court does, that the only antecedent is "transportation or sale," there is no reason to suppose that "service" was meant to be taken as the equivalent of "sale" as well as of "transportation," or that it limits either. Section 7 (b) refers only to the abandonment of services "rendered by means of" jurisdictional facilities. There is not the slightest hint in the section that sales are considered to be such services.[2]

Finally, the Court points to the requirement of § 7 (e), *ante*, p. —, that the applicant for a certificate be willing and able "to do the acts and perform the service proposed." From this it infers that *all* the matters for which § 7 (c), *ante*, p. —, requires a certificate "must be justified in terms of a 'service' to which they relate." I should have thought it quite plain that an applicant is required to "perform the service proposed" only *if* a service is proposed. Perhaps it would have been more apt for Congress to have said "do the acts *and/or* perform the services proposed," but I cannot understand how the

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in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

[2] "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

clause as written can be read as meaning that whatever the applicant proposes must be both an act and a service.

I must conclude that there is nothing in the statute which makes "sale" the equivalent of "service." On the contrary, the terms are always used disjunctively. A sale, as a jurisdictional ground distinct from either transportation or the maintenance of jurisdictional facilities (§ 1 (b) *ante*, p. ——) is a limited transaction. A certificate authorizing a sale authorizes no more and, in my view, must be regarded as expiring when the underlying sale terminates, except in a situation where the Commission has properly conditioned issuance on continuance of the certificate for a longer period. See *post*, p. ——. It is suggested that the Commission has consistently held that the obligation to provide service persists even after a particular contract terminates. See *United Gas Pipe Line Co.*, 3 F. P. C. 3; *Cabot Gas Corp., id.*, 357; *Godfrey L. Cabot, Inc., id.*, 582; *Panhandle Eastern Pipe Line Co.*, 11 F. P. C. 167, 172. All those cases, however, involved pipeline companies which were in fact providing a continuing service and which had facilities subject to the jurisdiction of the Commission regardless of the duration of a particular contract. They serve as no authority for the present quite different situation where an independent producer is subject to the Commission's jurisdiction only by virtue of his sales.

II.

The Court asserts that a construction of the statute contrary to the one it reaches will result in intolerable consequences, primarily in two respects. *First*, it says, producers and pipelines would be able to abandon their undertakings at the end of the contract term without a showing that the public convenience and necessity justify such abandonment, thus defeating the policy of § 7 (b) of

the Act, and giving the industry a lever to avert regulation of any kind. *Second*, it concludes, producers would be able, at the expiration of their contracts, to file a higher price as an initial rate under a new certificate. This would force the Commission, it is said, to test the reasonableness of the rate under § 5 (a), *ante*, p. —, where the Commission has the burden of proof and where experience has shown the procedure to be subject to great delays, and would avoid the rate-change procedures of § 4 (e), *ante*, p. —, where the producer has the burden of proof and the effectiveness of the rate can be suspended pending investigation.

As to abandonment, the Court's view again rests on the erroneous notion that the Commission is charged with assuring continuity of "service" on the part of independent producers. However, § 7 (b), by its own terms, prohibits abandonment of only two things: jurisdictional facilities, and any service "rendered by means of" such facilities. The Court does not suggest that petitioners have any jurisdictional facilities. And there can be no apprehension about the pipelines, since they clearly provide a service by means of jurisdictional facilities and are certificated for an unlimited duration.

There is a more basic reason, however, why the evils which the Court imagines do not exist. The Commission is required to issue a certificate only if the applicant's proposal is required by the public convenience and necessity. The vast majority of sales are, of economic necessity, bona fide transactions of substantial duration (see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, at 344) and will, of course, be approved in ordinary course. But surely, if a proposal contains such disingenuous provisions as the Court suggests, its certification would not be in the public interest. The Court's fear that denial of the certificate under such circumstances would be

overturned on review is the sheerest speculation, especially in an area where the Commission is entrusted with such wide discretion.

Furthermore, the Commission can tender a perpetual certificate under its § 7 (e) power to attach reasonable terms and conditions.[3] But in such a case, it would have to bear the burden of showing that the public convenience and necessity require such a condition. What the Court in effect permits the Commission to do here is simply to attach the condition without such a showing. If, as the Commission stoutly maintains, a limited certificate would constitute a serious threat to the public interest, then surely it is not too much to ask it to show that fact before tendering a producer a certificate different from the one he has requested. And where the Commission has fairly made such a showing, I cannot believe, with all deference to the Court's contrary intimation, that there is the slightest danger that its action would nonetheless be overturned on the theory it was attempting to accomplish indirectly that which it cannot do directly. Such a view assumes that a court will be blind to the conditioning power expressly given the Commission by statute, and ignores the fact that there is a very real difference between tendering an unlimited certificate when the Commission has made no affirmative showing of public need for a perpetual duration and tendering one when it has made such a showing. In the last analysis, that additional burden is the only consequence which turns on the outcome of these cases.

I would hold that where, as in No. 335, an independent producer applies for authority simply to engage in a sale transaction specifically limited in duration, the Commis-

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[3] "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

sion has no authority to tender an unlimited certificate without bearing the burden of showing that such a departure from the proposal is required by the public convenience and necessity.

III.

The question remains whether petitioner in No. 321 proposed a sale transaction which was limited in duration, and whether the Commission certificated no more than that sale. The term of the contract filed with the Commission was clearly limited to 10 years. Petitioner's application incorporated that contract by reference, and declared that "[t]his application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described." The Commission ordered that a certificate be "hereby issued . . . authorizing the sale by Applicant of natural gas . . . as more fully described in the application and exhibits in this proceeding. . . . The certificate . . . shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act . . . ." I think the fair interpretation of all this is that what was authorized was the sale proposed, and that the certificate should therefore be taken as limited in duration to the term of the sale contract.

The Commission, however, contends that since, at the time petitioner's certificate was issued, it had taken the position in *Sunray Oil Corp.*, 14 F. P. C. 877, that it had no power to issue a certificate specifically limited in duration, this certificate must be taken as one unlimited in duration. That position, however, was later reversed on appeal, *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, and the Commission acquiesced therein. But the Commission was more fundamentally wrong in believing that a certificate authorizing a sale

is unlimited unless specifically otherwise conditioned. Therefore, when it tendered to petitioner a certificate without any limiting language, its erroneous belief that it was issuing a perpetual certificate could not bind petitioner. The Commission was authorized to issue only a certificate limited to the duration of the sale unless a condition were expressly imposed to the contrary, and what it issued purported to be no more than that. Petitioner cannot be taken to have acquiesced in a certificate authorizing something other than it requested, where the certificate gave no notice of that fact, simply because the Commission may have believed its effect to be otherwise.

I fear this is another instance where the Court has taken impermissible liberties with statutory language in order to remedy what it considers an undesirable deficiency in the way Congress has written the statute. Cf. *United States* v. *Republic Steel Corp.*, 363 U. S. —, — (dissenting opinion).

I would reverse the judgments in both cases.

SUPREME COURT OF THE UNITED STATES

Nos. 321 and 335.—October Term, 1959.

Sun Oil Company, Petitioner, 321 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Sunray Mid-Continent Oil Co., Petitioner, 335 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

Mr. Justice Frankfurter, concurring in the dissent.

In joining Mr. Justice Harlan's opinion I should like to add a word by way of emphasis.

Once analysis of the problem of these two cases, relating as they do exclusively to independent producers of natural gas, is stripped of darkening details and reduced to its statutory determinants, as spelled out in my Brother Harlan's dissent, the answer becomes clear and uncomplicated. If a licensing agency has power to grant a particular kind of license, an applicant has the right to apply for such a license. It may be withheld without ado only if the agency has arbitrary—judicially unreviewable—power to withhold such a license. Concededly the Commission has power to grant a time-limited certificate, and its denial of such a certificate is not free from judicial review. Therefore it must give a reason for denying a proper application, with due regard, of course, to its wide discretionary power for determining what satisfies "public convenience and necessity." The Commission cannot rest denial on its *ipse dixit*. Nor can the Commission rest on the general spirit or the ultimate purposes of the Natural Gas Act, for to do so amounts to saying that the Act forbids time certificates, when in fact it does not.